TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~408.~~ 493

SIDNEY L. CHAFFEE AND RUE P. HUTCHINS, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED AUGUST 26, 1872.

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1 At a circuit court of the United States, within and for the sixth judicial circuit and southern district of Ohio, begun and held at the court-house, in the city of Cincinnati, on the first Tuesday, being the first day of February, in the year of our Lord one thousand eight hundred and seventy, and of the Independence of the United States of America the ninety-fourth, present, the Honorable H. H. Emmons and the Honorable H. H. Leavitt, judges of said court.

Among the proceedings had were the following, to wit:

THE UNITED STATES OF AMERICA *vs.* HIGHLAND D. CHAFFEE, SIDNEY L. Chaffee, William M. Chaffee, and Rue P. Hutchins, partners, as H. D. Chaffee & Co.	747.	Debt.

Be it remembered that heretofore, to wit, on the nineteenth day of February, in the year of our Lord one thousand eight hundred and sixty-seven, came the plaintiff, by Durbin Ward, its attorney, and sued out of the clerk's office of the court aforesaid the writ of summons ad respondendum against the defendants herein, which said writ is in the words and figures following, to wit:

Summons.

UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

The President of the United States of America, to the marshal of the southern district of Ohio, greeting:

You are hereby commanded to summon Highland D. Chaffee, Sidney L. Chaffee, William M. Chaffee, and Rue P. Hutchins, partners, as H. D. Chaffee & Co., citizens of and resident in the State of Ohio, if he be found in your district, to be and appear in the circuit court of
2 the United States, for the southern district of Ohio, aforesaid, at Cincinnati, on the first Tuesday in the month of March, 1867, to answer unto the United States of America of a plea of debt. And have you then and there this writ.

Witness, the Honorable Salmon P. Chase, Chief Justice of the United States, this nineteenth day of February, A. D. 1867, and in the ninety-first year of the Independence of the United States of America.

Attest:

[SEAL.] JOHN McLEAN, *Clerk.*

Upon which said writ is the following endorsement, to wit:

Cause of action.

Suit brought to recover $192,000, being penalty due plaintiffs from defendants for the non-payment of the tax on 48,000 gallons of whisky, as required by the internal-revenue laws of the United States, said whisky being manufactured by said defendants during the years 1863, 1864, & 1865, and during the year 1866, prior to September 1st, 1866, at their distillery at Tippecanoe, Miami County, Ohio.

DURBIN WARD,
U. S. Att'y, S. D. O.

Debt	$192,000 00
Damages	96,000 00
Due in equity	192,000 00

And afterwards, to wit, on the 5th day of March, in the year last aforesaid, came the said marshal to whom said writ was in form aforesaid directed, and returned the same into the clerk's office of said court with his proceedings endorsed thereon, in the words and figures following, to wit:

Marshal's return to summons.

Served the within summons by leaving certified copies thereof at the places of residence & with the wives respectively of Highland D. Chaffee, Sidney L. Chaffee, and Rue P. Hutchins, and by delivering a certified copy thereof to William M. Chaffee, this 28th day of February,
3 A. D. 1867.

A. HICKENLOOPER, JR.,
U. S. M., Southern District of Ohio.
By C. N. BURNS,
Deputy Marshal.

And afterwards, to wit, on the 16th day of March, in the year last aforesaid, came the plaintiff, by its attorney, and filed in the clerk's office of said court its declaration against the defendants herein, which said declaration is in the words and figures following, to wit:

Declaration.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

In the circuit court of the United States, within and for the sixth circuit, and southern district of Ohio, of the term of February, A. D. 1867.

The United States of America, plaintiffs, complain of Highland D Chaffee, Sidney L. Chaffee, William M. Chaffee, and Rue P. Hutchins, late partners doing business under the firm-name of H. D. Chaffee & Co., defendants in a plea of debt, that they render unto the plaintiffs the sum of one hundred and ninety-two thousand dollars, which they owe to and unjustly detain from the plaintiffs.

FIRST COUNT.—For that whereas the defendants, heretofore, to wit, from the seventh day of March, A. D. 1864, continuously until the first day of July, A. D. 1864, were and still are citizens and residents in the town of Tippecanoe, in the county of Miami, in the State of Ohio, and in the fourth collection district of internal revenue of said State of Ohio, to wit, in the southern district of Ohio, within the meaning of the act of Congress of the United States, entitled, "An act to provide internal reve-
4 nue to support the Government and to pay interest on the public debt," approved July 1st, 1862, and of the several acts amendatory of said act; that, as such citizens and residents, they, the defendants, did from time to time, between the dates aforesaid, at said town, county, State, and district, carry on and transact the business of distillers of spirits, under said firm-name of H. D. Chaffee & Co., for which they were duly licensed by the proper United States authorities, thereto

duly empowered by law, and were then and there, and thereby, and by reason of their transacting and carrying on said business in said town, county, State, and district, and by virtue of the provisions of said act of Congress, and the said several acts amendatory thereof, bound to pay all the revenue and taxes thereby imposed on them, on their said business, and on their said property; and said defendants were bound by said law to comply with all the provisions of the act of Congress aforesaid, and the said several acts amendatory thereof, in reference to their said business and the distilled spirits so by them manufactured and distilled; nevertheless, the defendants, contriving and intending to evade the payment of their just and lawful taxes in that behalf payable, and fraudulently to cheat the plaintiffs, and with intent to evade the provisions of the act of Congress aforesaid, and of the said several acts amendatory thereof, and with intent to evade the payment of the lawful duties upon certain, to wit, twenty-two thousand gallons of distilled spirits by them distilled at their distillery as aforesaid, did, from time to time, between the dates aforesaid, at said town, county, State, and district, unlawfully, knowingly, and fraudulently, have in their custody and possession, and under their control, said twenty-two thousand gallons of distilled spirits, which said distilled spirits were then and there subject to a tax or duty of sixty cents for each and every gallon thereof, imposed by law thereon, which said duties had not then, nor
5 have the same since, been paid to plaintiffs, for the purpose of selling the same, with the design of avoiding the payment of the duties imposed by law thereon, in fraud of the internal-revenue laws of the United States; and the defendants did then and there, from time to time, as aforesaid, unlawfully and fraudulently sell, dispose of, and remove said distilled spirits, in such manner as that the lien of plaintiffs for the lawful duties thereon, imposed by law upon the same, became and has ever since been wholly lost to plaintiffs; and said taxes and duties have remained and still remain wholly unpaid; which said act of having in their custody and possession, and under their control, said distilled spirits, for the purpose of selling the same, with the design of avoiding the payment of the duties imposed by law thereon, in fraud of the internal-revenue laws of the United States, by said defendants, was contrary to the form of the statute in such case made and provided; whereby the defendants forfeited and became liable to pay to the plaintiff, for the offense aforesaid, the penalty of twenty-six thousand and four hundred dollars, double the amount of the taxes imposed by law upon said distilled spirits.

SECOND COUNT.—And also, for that whereas the defendant, heretofore, to wit, from the first day of July A. D. 1864, continuously until the first day of February A. D. 1865, were and still are citizens and residents in the town of Tippecanoe, in the county of Miami, in the State of Ohio, and in the fourth collection district of internal revenue of said State of Ohio, to wit, in the southern district of Ohio, within the meaning of the act of Congress of the United States entitled "An act to provide internal revenue to support the Government and to pay interest on the public debt," approved June 30th, 1864, and of the several acts amendatory of said act; that, as such citizens and residents,
6 they, the defendants, did from time to time, between the dates aforesaid, at said town, county, State and district, carry on and transact the business of distillers of spirits, under said firm-name of H. D. Chaffee & Co., for which they were duly licensed by the proper United States authorities, thereto duly empowered by law, and were then and there and thereby, and by reason of their transacting and

carrying on said business in said town, county, State, and district, and by virtue of the provisions of the act of Congress aforesaid, and the said several acts amendatory thereof, bound to pay all the revenue and taxes thereby imposed on them, on their said business, and on their said property, and said defendants were bound by said law to comply with all the provisions of the act of Congress aforesaid, and the said several acts amendatory thereof, in reference to their said business and the distilled spirits so by them manufactured and distilled; nevertheless the defendants, contriving and intending to evade the payment of their just and lawful taxes in that behalf payable, and fraudulently to cheat the plaintiffs, and with intent to evade the provisions of the act of Congress aforesaid, and of the said several acts amendatory thereof, and with intent to evade the payment of the lawful duties upon certain, to wit, twenty-two thousand gallons of distilled spirits, by them distilled at their distillery as aforesaid, did, from time to time, between the dates aforesaid, at said town, county, State, and district, unlawfully, knowingly and fraudulently have in their custody and possession, and under their control, said twenty-two thousand gallons of distilled spirits, which said distilled spirits were then and there subject to a tax or duty of one dollar and fifty-cents for each and every gallon thereof, imposed by law thereon, which said duties had not then nor have the same since been paid to the plaintiffs—for the purpose of selling the same, with the design of avoiding the payment of the duties imposed by law thereon, in fraud of the internal-revenue laws of the United
7 States, and the defendants did then and there, from time to time as aforesaid, unlawfully and fraudulently sell, dispose of, and remove said distilled spirits, in such manner as that the lien of plaintiffs for the lawful duties thereon, imposed by law upon the same, became and has ever since been wholly lost to plaintiffs, and said taxes and duties have remained and still remain wholly unpaid; which said act of having in their custody and possession, and under their control, said distilled spirits, for the purpose of selling the same, with the design of avoiding the payment of the duties imposed by law thereon, in fraud of the internal-revenue laws of the United States, by said defendants was contrary to the form of the statute in such case made and provided; whereby the defendants forfeited and became liable to pay to the plaintiffs, for the offense aforesaid, the penalty of sixty-six thousand dollars, double the amount of the taxes imposed by law upon said distilled spirits.

THIRD COUNT.—And also, for that whereas the defendants, heretofore, to wit, from the first day of February A. D. 1865, continuously until the first day of September A. D. 1866, were and still are citizens and residents in the town of Tippecanoe, in the county of Miami, in the State of Ohio, and in the fourth collection district of internal revenue of said State of Ohio, to wit, in the southern district of Ohio, within the meaning of the act of Congress of the United States entitled "An act to provide internal revenue to support the Government and to pay interest on the public debt," approved June 30th 1864, and of the several acts amendatory of said act; that, as such citizens and residents they, the defendants, did from time to time, between the dates aforesaid, at said town, county, State, and district, carry on and transact the business of distillers of spirits, under said firm-name of H. D. Chaffee
8 & Co., for which they were duly licensed by the proper United States authorities, thereto duly empowered by law, and were then and there and thereby and by reason of their transaction and carrying on said business in said town, county, State, and district, and by

virtue of the provisions of said act of Congress, and the said several acts amendatory thereof, bound to pay all the revenue and taxes thereby imposed on them, on their said business, and on their said property, and said defendants were bound by said law to comply with all the provisions of the act of Congress aforesaid, and the said several acts amendatory thereof, in reference to their said business and the distilled spirits so by them manufactured and distilled; nevertheless, the defendants, contriving and intending to evade the payment of their just and lawful taxes in that behalf payable, and fraudulently to cheat the plaintiffs, and with intent to evade the provisions of the act of Congress aforesaid, and of the said several acts amendatory thereof, and with intent to evade the payment of the lawful duties upon certain, to wit, twenty-four thousand and nine hundred gallons of distilled spirits by them distilled at their distillery as aforesaid, did, from time to time, between the dates aforesaid, at said town, county, State, and district, unlawfully, knowingly, and fraudulently have in their custody and possession, and under their control, said twenty-four thousand and nine hundred gallons of distilled spirits, which said distilled spirits were then and there subject to a tax or duty of two dollars for each and every gallon thereof, imposed by law thereon, which said duties had not then, nor have the same since been, paid to the plaintiffs—for the purpose of selling the same, with the design of avoiding the payment of the duties imposed by law thereon, in fraud of the internal-revenue laws of the United States, and the defendants did then and there, from time to time as aforesaid, unlawfully and fraudulently sell, dispose of, and
9 remove said distilled spirits, in such manner as that the lien of plaintiffs for the lawful duties thereon, imposed by law upon the same, became, and has ever since been, wholly lost to plaintiffs, and said taxes and duties have remained and still remain wholly unpaid; which said act of having in their custody and possession, and under their control, said distilled spirits, for the purpose of selling the same, with the design of avoiding the payment of the duties imposed by law thereon, in fraud of the internal-revenue laws of the United States, by said defendants, was contrary to the form of the statute in such case made and provided; whereby the defendants forfeited and became liable to pay to the plaintiffs, for the offense aforesaid, the penalty of ninety-nine thousand and six hundred dollars, double the amount of the taxes imposed by law upon said distilled spirits.

And an action hath accrued to the plaintiffs to demand and have of the defendants the sum of one hundred and ninety-two thousand dollars, together with costs in that behalf expended.

DURBIN WARD,
U. S. Attorney for the Southern District of Ohio.

And afterwards, to-wit, on the 26th day of April, in the year last aforesaid, an entry was made upon the journal of said court, in said case, in the words and figures following, to wit:

Entry.

THE UNITED STATES *vs.* H. D. CHAFFEE & CO. } 747. Debt.

On motion to the court, it is ordered that the default herein be and the same is hereby set aside, and defendants have leave to plead herein forthwith, & plea filed.

And which said plea is in the words and figures following, to wit:

10 *Plea.*

UNITED STATES OF AMERICA,
Southern Dist. of Ohio:

H. D. CHAFFEE & CO. }
ats. }
UNITED STATES. }

The joint and several plea of Highland D. Chaffee, S. L. Chaffee, and Rue P. Hutchins, partners doing business under the name & firm of H. D. Chaffee & Co.

And the said defendants, by their att'y, Jno. C. Dunlevy, say that they are not indebted to the pl'tffs in manner and form as the plaintiff hath in the third count of the declaration above thereof declared against them, and of this they put themselves upon the country.

And for a further plea in this behalf, as to the first and second counts in said declaration, the defendants say that they were not partners, as in said declaration alleged, nor doing business as distillers as alleged, during the time in said first and second counts alleged, nor any part thereof; and this they are ready to verify.

H. D. CHAFFEE & CO.,
By J. C. DUNLEVY, *Att'y.*

Continuance.

And afterwards, to wit, on the 14th day of June, in the year last aforesaid, it being at the April term of said court, this case was continued.

And afterwards, to wit, on the 5th day of November, in the year last aforesaid, an entry was made upon the journal of said court, in said case, in the words and figures following, to wit:

11 *Entry.*

THE UNITED STATES }
vs. } 747. Debt.
H. D. CHAFFEE & OTHERS. }

This cause came on to be heard upon the motion of defendants herein filed to dismiss this action, and was argued by counsel and submitted; and the court, upon consideration thereof, finds said motion to be not well taken, and doth overrule the same; to which overruling and refusal to dismiss said cause defendants, by their attorney, except.

And afterwards, to wit, but on the same day, and in the year last aforesaid, an entry was made upon the journal of said court, in said case, in the words and figures following, to wit:

Entry.

THE UNITED STATES }
vs. } Debt.
H. D. CHAFFEE & OTHERS. }

On motion by defendants' attorneys, leave is granted them to withdraw their pleas heretofore filed in this case, and to file new pleas,

which is done accordingly. And this day came the parties, by their attorneys, and thereupon came a jury, to wit: Joseph Glascock, Thomas Williams, M. J. Blair, Ezra Elliott, M. W. Perryman, F. W. Lister, George E. Dyer, James Dawson, S. M. Lee, H. M. Lee, George Maxwell, and George R. Groot, who were duly empan'eled, sworn, and affirmed well and truly to try the issue joined between the parties; and the evidence not being finished, the court adjourned the jury until half past nine o'clock to-morrow morning, to which time this case is continued.

Which said pleas, referred to in foregoing entry, are in the words and figures following, to wit:

12 *Pleas.*

United States circuit court, southern district of Ohio.

UNITED STATES
vs.
H. D. CHAFFEE & CO.

And now come the defendants, H. D. Chaffee, S. L. Chaffee, W'm M. Chaffee, and R. P. Hutchins, and defend the wrong and injury, &c., and say that they are not guilty in manner and form as alleged in said declaration, & of this they put themselves upon the country.

And for a further plea in that behalf, defendants say that they are not indebted to the plaintiff in manner and form as the said plaintiff hath, in said declaration, alleged, and of this they put themselves upon the country.

H. D. CHAFFEE,
S. L. CHAFFEE,
W'M. M. CHAFFEE, &
R. P. HUTCHINS,
Per DUNLEVY & STEVENSON, *Att'ys.*

And afterwards, to wit, this cause progressed from day to day until, to wit, the 5th day of December, in the year last aforesaid, on which day an entry was made upon the journal of said court, in the words and figures following, to wit:

Entry—Judgment.

THE UNITED STATES
vs.
HIGHLAND D. CHAFFEE, SIDNEY L. CHAFFEE, William M. Chaffee, & Rue P. Hutchins, partners as H. D. Chaffee & Co. } 747. Debt.

13 This day again came the parties by their attorneys, and also the jurors heretofore empan'eled, sworn, and affirmed to try the issue joined between the parties, who, upon their oaths and affirmations, do say that the said defendants do owe to the said plaintiffs the sum of two hundred and fifty-three thousand one hundred and thirty-two dollars ($253,132\frac{00}{100}$), and assess the damages by reason of the detention thereof, at one cent; it is therefore considered that the said United States of America, plaintiffs, recover of the said Highland D. Chaffee, Sidney L. Chaffee, William M. Chaffee, and Rue P. Hutchins, defendants, the said sum of two hundred and fifty-three thousand one hundred

and thirty-two dollars, their debt aforesaid, together with one cent, their said damages, and also their costs in this behalf expended, taxed at $, and execution is awarded therefor.

And afterwards, to wit, on the 11th day of December, in the year last aforesaid, an entry was made upon the journal of said court, in said case, in the words and figures following, to wit:

Entry.

THE UNITED STATES } 747. Debt.
vs.
H. D. CHAFFEE & CO. }

It appearing that the verdict and judgment in this case should have been entered upon the third count of the declaration, the plaintiffs having abandoned the first and second counts, it is ordered that said verdict and judgment be and the same are hereby set aside.

And afterwards, to wit, on the 6th day of March, in the year of our Lord one thousand eight hundred and sixty-eight, an entry was made upon the journal of said court, in said case, in the words and figures following, to wit:

14

Entry.

THE UNITED STATES } 747. Debt.
vs.
H. D. CHAFFEE & CO. }

This case came on to be heard upon the motion of defendants' attorneys for a new trial, and was argued by counsel and submitted, and the court, on consideration thereof, doth sustain the same and grant said motion, on payment, by said defendants, of all costs herein, within thirty days from the date of this entry. And this case continued.

And afterwards, to wit, on the 14th day of April, in the year last aforesaid, an entry was made upon the journal of said court, in said case, in the words and figures following, to wit:

Entry.

THE UNITED STATES } 747. Debt.
vs.
H. D. CHAFFEE & CO. }

This day came the district attorney, and by leave of court first obtained, filed herein his amended declaration; which said amended declaration is in the words and figures following, to wit:

Amended declaration.

THE UNITED STATES OF AMERICA,
Southern District of Ohio:

In the circuit court of the United States, within and for the sixth circuit and southern district of Ohio. Of the term of April, A. D. 1868.

The United States of America, plaintiffs, complain of Highland D. Chaffee, Sidney L. Chaffee, William M. Chaffee, and Rue P. Hutchins,

late partners, doing business under the firm-name of H. D. Chaffee & Co., defendants in a plea of debt, that they render unto the plaintiffs the sum of one million and ten thousand dollars, which they owe
15 to and unjustly detain from the plaintiffs.

FIRST COUNT.—For that whereas the defendants heretofore, to wit, from the seventh day of March A. D. 1864, continuously until the first day of July A. D. 1864, were, and still are, citizens and residents in the town of Tippecanoe, in the county of Miami, in the State of Ohio, and in the fourth collection district of internal revenue of said State of Ohio, to wit, in the southern district of Ohio, within the meaning of the act of Congress of the United States, entitled "An act to provide internal revenue to support the Government, and to pay interest on the public debt," approved July 1st, 1862, and of the several acts amendatory of said act, that, as such citizens and residents, they, the defendants, did from time to time, between the dates aforesaid, at said town, county, State, and district, carry on and transact the business of distillers of spirits, under said firm-name of H. D. Chaffee & Co., for which they were duly licensed by the proper United States authorities, thereto duly empowered by law, and were then and there and thereby, and by reason of their transacting and carrying on said business in said town, county, State, and district, and by virtue of the provisions of said act of Congress, and the said several acts amendatory thereof, bound to pay all the revenues and taxes thereby imposed on them, on their said business, and on their said property, and said defendants were bound by said law to comply with all the provisions of the act of Congress aforesaid, and the said several acts amendatory thereof, in reference to their said business and the distilled spirits so by them manufactured and distilled. Nevertheless, the defendants contriving and intending to evade the payment of their just and lawful taxes in that behalf payable, and fraudulently to cheat the plaintiffs, and with intent to evade the provisions of
16 the act of Congress aforesaid, and of the several acts amendatory thereof, and with intent to evade the payment of the lawful duties upon certain, to wit, fifty thousand gallons of distilled spirits by them distilled at their distillery as aforesaid, did, from time to time, between the dates aforesaid, at said town, county, State, and district, unlawfully, knowingly, and fraudulently have in their custody and possession, and under their control, said fifty thousand gallons of distilled spirits, (which said distilled spirits were then and there subject to a tax or duty of sixty cents for each and every gallon thereof, imposed by law thereon, which said duties had not then, nor have the same since been, paid to plaintiffs,) for the purpose of selling the same, with the design of avoiding the payment of the duties imposed by law thereon, in fraud of the internal-revenue laws of the United States, and the defendants did then and there, from time to time as aforesaid, unlawfully and fraudulently sell, dispose of, and remove said distilled spirits, in such manner as that the lien of plaintiffs for the lawful duties thereon, imposed by law upon the same, became and has ever since been wholly lost to plaintiffs, and said taxes and duties have remained and still remain wholly unpaid; which said act of having in their custody and possession, and under their control, said distilled spirits for the purpose of selling the same, with the design of avoiding the payment of the duties imposed by law thereon, in fraud of the internal-revenue laws of the United States, by said defendants, was contrary to the form of the statute in such case made and provided; whereby the defendants forfeited and became liable to pay to the plaintiffs for the offense afore-

said, the penalty of sixty thousand dollars, double the amount of the taxes imposed by law upon said distilled spirits.

SECOND COUNT.—And also, for that whereas the defendants
17 heretofore, to wit, from the first day of July A. D. 1864, continuously until the first day of February A. D. 1865, were and still are citizens and residents in the town of Tippecanoe, in the county of Miami, in the State of Ohio, and in the fourth collection district of internal revenue of said State of Ohio, to wit, in the southern district of Ohio, within the meaning of the act of Congress of the United States, entitled "An act to provide internal revenue to support the Government and to pay interest on the public debt," approved June 30th, 1864, and of the several acts amendatory of said act; that, as such citizens and residents, they, the defendants, did from time to time, between the dates aforesaid at said town, county, State, and district, carry on and transact the business of distillers of spirits, under said firm-name of H. D. Chaffee & Co., for which they were duly licensed by the proper United States authorities, thereto duly empowered by law, and were then and there and thereby, and by reason of the transacting and carrying on said business in said town, county, State, and district, and by virtue of the provisions of the act of Congress aforesaid, and the said several acts amendatory thereof, bound to pay all the revenue and taxes thereby imposed on them, on their said business, and on their said property, and said defendants were bound by said law to comply with all the provisions of the act of Congress aforesaid, and the said several acts amendatory thereof, in reference to their said business and the distilled spirits so by them manufactured and distilled; nevertheless the defendants contriving and intending to evade the payment of their just and lawful taxes in that behalf payable, and fraudulently to cheat the plaintiffs, and with intent to evade the provisions of the act of Congress aforesaid, and of the said several acts amendatory thereof, and with intent to evade the payment of the lawful duties upon certain, to wit,
fifty thousand gallons of distilled spirits, by them distilled at their
18 distillery as aforesaid, did from time to time, between the dates aforesaid, at said town, county, State and district, unlawfully, knowingly, and fraudulently have in their custody and possession, and under their control, said fifty thousand gallons of distilled spirits, (which said distilled spirits were then and there subject to a tax or duty of one dollar and fifty cents for each and every gallon thereof, imposed by law thereon, which said duties had not then, nor have the same since, been paid to the plaintiffs,) for the purpose of selling the same, with the design of avoiding the payment of the duties imposed by law thereon, in fraud of the internal-revenue laws of the United States; and the defendants did then and there, from time to time as aforesaid, unlawfully and fraudulently sell and dispose of and remove said distilled spirits, in such manner as that the lien of plaintiffs, for the lawful duties thereon imposed by law upon the same, became and has ever since been wholly lost to plaintiffs, and said taxes and duties have remained and still remain wholly unpaid; which said act of having in their custody and possession, and under their control, said distilled spirits, for the purpose of selling the same, with the design of avoiding the payment of the duties imposed by law thereon in fraud of the internal-revenue laws of the United States, by said defendants, was contrary to the form of the statutes in such case made and provided; whereby the defendants forfeited and became liable to pay to the plaintiffs, for the offense aforesaid, the penalty of one hundred and fifty thousand dollars, double the amount of the taxes imposed by law upon said distilled spirits.

THIRD COUNT.—And also for that whereas the defendants heretofore, to wit, from the first day of February, A. D. 1865, continuously until the first day of September, A. D. 1866, were, and still are, citizens and residents in the town of Tippecanoe, in the county of Miami, in
19 the State of Ohio, and in the fourth collection district of internal revenue of said State of Ohio, to wit, in the southern district of Ohio, within the meaning of the act of Congress of the United States entitled "An act to provide internal revenue to support the Government and to pay interest on the public debt," approved June 30, 1864, and of the several acts amendatory of said act; that, as such citizens and residents, they, the defendants, did from time to time, between the dates aforesaid, at said town, county, State, and district, carry on and transact the business of distillers of spirits under said firm-name of H. D. Chaffee & Co., for which they were duly licensed by the proper United States authorities, thereto duly empowered by law, and were then and there and thereby, and by reason of their transacting and carrying on said business in said town, county, State, and district, and by virtue of the provisions of said act of Congress and the said several acts amendatory thereof, bound to pay all the revenue and taxes thereby imposed on them, on their said business, and on their said property; and said defendants were bound by said law to comply with all the provisions of the act of Congress aforesaid, and the said several acts amendatory thereof, in reference to their said business and the distilled spirits so by them manufactured and distilled. Nevertheless, the defendants, contriving and intending to evade the payment of their just and lawful taxes in that behalf payable, and fraudulently to cheat the plaintiffs, and with intent to evade the provisions of the act of Congress aforesaid and of the said several acts amendatory thereof, and with intent to evade the payment of the lawful duties upon certain, to wit, two hundred thousand gallons of distilled spirits, by them distilled at their distillery as aforesaid, did from time to time, between dates aforesaid, at said town, county, State, and district, unlawfully, know-
20 ingly, and fraudulently have in their custody and possession, and under their control, said two hundred thousand gallons of distilled spirits, (which said distilled spirits were then and there subject to a tax or duty of two dollars for each and every gallon thereof, imposed by law thereon, which said duties had not then nor have the same since been paid to the plaintiffs,) for the purpose of selling the same, with the design of avoiding the payment of the duties imposed by law thereon, in fraud of the internal-revenue laws of the United States; and the defendants did then and there, from time to time as aforesaid, unlawfully and fraudulently sell, dispose of, and remove said distilled spirits, in such manner as that the lien of plaintiffs for the lawful duties thereon, imposed by law upon the same, became and has ever since been wholly lost to plaintiffs, and said taxes and duties have remained and still remain wholly unpaid; which said act of having in their custody and possession, and under their control, said distilled spirits, for the purpose of selling the same, with the design of avoiding the payment of the duties imposed by law thereon, in fraud of the internal-revenue laws of the United States, by said defendants, was contrary to the form of the statute in such case made and provided, whereby the defendants forfeited and became liable to pay to the plaintiffs, for the offense aforesaid, the penalty of eight hundred thousand dollars, double the amount of the taxes imposed by law upon said distilled spirits.

And an action hath accrued to the plaintiffs to demand and have of

the defendants the sum of one million and ten thousand dollars, together with costs in that behalf expended.

DURBIN WARD,
U. S. District Attorney.

21 And afterwards, to wit, on the 12th day of May, in the year last aforesaid, an entry was made upon the journal of said court in said case, in the words and figures following, to wit:

THE UNITED STATES } 747. Debt.
vs.
H. D. CHAFFEE ET AL. }

On motion to the court by defendants' attorney, it is ordered that said defendants have leave until May the 25th, inst., in which to file their plea to the amended declaration of plaintiffs. And, on further motion of defendants, this case is continued, at defendants' costs, for this term.

And afterwards, to wit, on the 25th day of May, in the year last aforesaid, came the defendants, by their attorneys, and filed in the clerk's office of said court their demurrer to the amended declaration of plaintiff herein, which said demurrer is in the words and figures following, to wit:

Demurrer to amended declaration.

UNITED STATES,
Southern District of Ohio:

United States circuit court.

THE UNITED STATES, PL'FFS, } No. 747. Demurrer to amended declaration.
vs.
H. D. CHAFFEE & CO. }

The said defendants, by Tilden, Stevenson & Tilden, and J. C. Dunlevy, their attorneys, say that the said amended declaration is not sufficient in law.

TILDEN, STEVENSON & TILDEN, AND
J. C. DUNLEVY,
Atty's for Defendants.

22 And afterwards, to wit, on the 17th day of December, in the year last aforesaid, an entry was made upon the journal of said court, in said cause, in the words and figures following, to wit:

Entry.

THE UNITED STATES } 747. Debt.
vs.
H. D. CHAFFEE & CO. }

On motion of the district attorney, it is ordered by the court that Louis M. Hosea, esquire, be, and he is hereby appointed a special commissioner herein to take testimony in this case, under the rules.

And afterwards, to wit, on the 17th day of February, in the year of our Lord one thousand eight hundred and sixty-nine, an entry was made upon the journal of said court in said case, in the words and figures following, to wit:

Entry.

THE UNITED STATES } 747. Debt.
vs.
H. D. CHAFFEE & CO. }

On motion to the court, it is ordered that L. M. Hosea, esq., be, and he hereby is, appointed a special master commissioner to take the deposition of J. S. Nace as a witness, upon due notice to the defendants in the above-entitled case.

And afterwards, to wit, on the 14th day of June, in the year last aforesaid, an entry was made upon the journal of said court, in said case, in the words and figures following, to wit:

Entry.

THE UNITED STATES } 747. Debt.
vs.
H. D. CHAFFEE & CO. }

This day this cause came on to be heard upon the demurrer of defendants to plaintiffs' amended declaration, and was argued by counsel and submitted, and the court upon consideration thereof deem
23 said demurrer to be not well taken and doth overrule the same. And this case is continued.

And afterwards, to wit, on the 21st day of June, in the year last aforesaid an entry was made upon the journal of said court, in said case, in the words and figures following, to wit:

Entry.

THE UNITED STATES } 747. Debt.
vs.
H. D. CHAFFEE & CO. }

On motion, it is ordered that the continuance hereinbefore entered is set aside, and on further motion it is ordered that defendants have leave to plead in above case within sixty days. And this cause is continued.

And afterwards, to wit, on the 23d day of February, in the year of our Lord one thousand eight hundred and seventy, an entry was made upon the journal of said court in said case, in the words and figures following, to wit:

Entry.

THE UNITED STATES } 747. Debt.
vs.
H. D. CHAFFEE & CO. }

On motion to the court by defendants' counsel, it is ordered that this case be postponed at defendants' costs of this term to this time, and specially set for trial 8th day of March next.

And afterwards, to wit, on the 3d day of March, in the year last aforesaid, came S. L. Chaffee and Rue P. Hutchins, by John F. Follett, esq., their attorney, and filed in the clerk's office of said court (by leave) their plea herein, which said plea is in the words and figures following, to wit:

Circuit court of the United States, southern district of Ohio.

24 *Plea of S. L. Chaffee & R. P. Hutchins.*

UNITED STATES *vs.* H. D. CHAFFEE & CO. } Plea of S. L. Chaffee & Rue P. Hutchins to the amended declaration.

And now come S. L. Chaffee and Rue P. Hutchins and say that they are the sole surviving partners of the late firm of H. D. Chaffee & Co.; that the said firm of H. D. Chaffee & Co. was formed and commenced business on or about the 28th day of October, A. D. 1865, and not before that time; that the said firm consisted of H. D. Chaffee, who is now deceased, and these defendants, S. L. Chaffee and Rue P. Hutchins and no others; that the said William M. Chaffee was not a member of said firm of H. D. Chaffee & Co., and neither had or has any interest whatever in the said firm or the business thereof, and this they are ready to make appear.

2. And for a further plea in this behalf as to the first and second counts in said amended declaration, said defendants S. L. Chaffee and Rue P. Hutchins say that the firm of H. D. Chaffee & Co. was not in existence, nor was said firm doing business as distillers or otherwise, during the time in said first and second counts alleged, or any part thereof, and this they are ready to make appear.

3. And for a further plea in this behalf as to the third count in said amended declaration, said defendants S. L. Chaffee and Rue P. Hutchins, say that the firm of H. D. Chaffee & Co. was not in existence, nor was said firm doing business as distillers or otherwise, from the first day of February, A. D. 1865, to the 28th day of October, A. D. 1865, or at any time between said dates of the time in said third count alleged, and this they are ready to make appear.

And for a further plea in this behalf as to all the counts of said declaration, said S. L. Chaffee and Rue P. Hutchins, defendants, say
25 that they are not guilty in manner and form as alleged in said counts of said declaration, or either of them, and of this they put themselves upon the country.

And, for further plea in this behalf, as to all the counts of said declaration, said defendants S. L. Chaffee and Rue P. Hutchins say that they are not indebted to the said plaintiff in manner and form as alleged in said counts of said declaration, or either of them; and of this they put themselves upon the country.

S. L. CHAFFEE,
RUE P. HUTCHINS,
By JOHN F. FOLLETT,
Their Att'y.

Across the margin of which said plea appear the words following, to wit:

The first three pleas are not admitted to be filed in this cause.
HENRY HOOPER,
Ass't U. S. Att'y.

And afterwards, to wit, on the 7th day of March, in the year last aforesaid, an entry was made upon the journal of said court, in said case, in the words and figures following, to wit:

Entry.

THE UNITED STATES *vs.* H. D. CHAFFEE & Co. } 747.

On motion to the court, and by consent of parties, it is ordered that the default herein be, and the same hereby is, set aside, and that defendant William M. Chaffee have leave to file his seperate plea forthwith; and plea filed.

And which said plea is in the words and figures following, to wit:

Circuit court of the United States, southern district of Ohio.

Plea of William M. Chaffee.

UNITED STATES *vs.* H. D. CHAFFEE & Co. } No. 747. Seperate plea of W'm M. Chaffee.

26 And the said defendant William M. Chaffee, by Follett & Wright, his attorneys, now comes and defends the wrong and injury when, &c., and prays judgment of the said amended declaration, because he says he was not, at any times during the times mentioned in said amended declaration, or in any or either counts thereof, or at any other time, a member of the firm of H. D. Chaffee & Co., or in any manner interested in said firm, or the business thereof, and that he, said William M. Chaffee, is improperly joined, as a party-defendant herein. And this said defendant is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have or maintain the aforesaid action against him.

FOLLETT & WRIGHT,
Att'ys for W'm M. Chaffee.

And afterwards, to wit, on the 8th day of March, in the year last aforesaid, came the plaintiff, by Warner M. Bateman, its attorney, and filed in the clerk's office of said court its replication to plea of William M. Chaffee herein, which said replication is in the words and figures following, to wit:

Replication to plea of W. M. Chaffee.

THE UNITED STATES *vs.* H. D. CHAFFEE & Co. } U. S. cir. court.

Now come the pl'ffs, by the district attorney, and as to the plea of W. M. Chaffee, filed herein, say that it is not true that the said W'm M. Chaffee was not a member of the firm of the said H. D. Chaffee & Co., as set forth in said amended declaration. And of this they put themselves upon the country; and the def'd't doth the like.

WARNER M. BATEMAN, *U. S. Att'y.*

27 And afterwards, to wit, on the 8th day of March, in the year last aforesaid, an entry was made upon the journal of said court, in said case, in the words and figures following, to wit:

Entry.

THE UNITED STATES } 747. In debt.
vs.
H. D. CHAFFEE & Co. }

This day came the parties by their attorneys; and thereupon, to try the issue, came a jury, to wit: Robert Hosea, George Skaats, William Gibson, Thomas J. Biggs, John Scott, William H. Davis, John D. Caldwell, James Gilmore, Hermann Duhme, John Wynne, Thomas W. Sprague, and Frederick C. Bennett, who were duly empaneled and sworn, well and truly to try the issue joined between the parties. And the evidence not being completed, the court adjourned the jury until to-morrow morning at 10 o'clock, until which time this cause is continued.

And afterwards, to wit, on the 9th day of March, in the year last aforesaid, an entry was made upon the journal of said court in said case, in the words and figures following, to wit:

Entry.

THE UNITED STATES } 747. In debt.
vs.
H. D. CHAFFEE & Co. }

Now comes counsel for defendants, and gives the court to understand and be informed, after the issue was made up in this cause, and before the trial, that the said Highland D. Chaffee, one of the defendants in this cause, is dead, and the said Sidney L. Chaffee, Rue P. Hutchins, and William M. Chaffee survived him, which said allegation the said plaintiffs do not deny, but admit the same to be true. Therefore, it is ordered that all proceedings against Highland D. Chaffee be
28 stayed and abate, and that this cause proceed against the surviving parties; and leave is given parties to amend and modify the pleadings accordingly.

And thereupon again came the parties, by their attorneys, and also the jurors heretofore empaneled; and herein, and for reasons satisfactory to the court, and by consent of counsel, Frederick C. Bennett, one of said jurors, is withdrawn, and the jury discharged.

And thereupon, the court proceeding to empanel another jury, the following jurors being called, came, to wit: Robert Hosea, William Gibson, Thomas J. Biggs, John Scott, William H. Davis, John D. Caldwell, James Gilmore, Herman Duhme, Thomas W. Sprague, John Church, jr., Charles C. Reakirt, and John M. Doty, who were duly empaneled, and sworn well and truly to try the issue joined between the parties herein. And the evidence not being completed, the court adjourned the jury until to-morrow morning at 10 o'clock, to which time this cause is continued.

And afterwards this cause progressed from day to day until, to wit, on the 18th day of March, in the year last aforesaid, on which day an entry was made upon the journal of said court in said case in the words and figures following, to wit:

Entry.

THE UNITED STATES
vs.
HIGHLAND & SIDNEY L. CHAFFEE, W'M M. Chaffee, & R. P. Hutchins. } 747. In debt.

And now come the plaintiffs, by their counsel, and in open court confess that they will not further prosecute said William M. Chaffee on either count of the declaration, or on the issues above joined between plaintiffs and said W'm M. Chaffee; it is therefore ordered, that said W'm M. Chaffee be thereof acquit, and go hence without day. And plaintiffs, by their counsel, now in open court, further confess that they will not further prosecute the said Sidney L. Chaffee and Rue P.
29 Hutchins on said first and second counts of the declaration, or on the issues joined between the plaintiffs and said S. L. Chaffee and Rue P. Hutchins on said first and second counts; therefore it is ordered that as to the issues joined on said first and second counts, said S. L. Chaffee and R. P. Hutchins be thereof acquit, and go hence without day. And thereupon come the parties, by their counsel, and also the jurors heretofore empaneled and sworn well and truly to try the issue joined between the parties in this cause, and the evidence being completed, but counsel not having concluded their arguments, the court adjourned the jury until to-morrow morning at ten o'clock, until which time this cause is continued.

And afterwards, to wit, on the 19th day of March, in the year last aforesaid, and during the progress of the trial of said cause, came the plaintiff, by Warner M. Bateman, esq., its attorney, and filed in the clerk's office of said court its replication to pleas of S. L. Chaffee & Rue P. Hutchins herein, which said replication is in the words and figures following, to wit:

Replication to pleas of S. L. Chaffee & R. P. Hutchins.

THE UNITED STATES
vs.
H. D. CHAFFEE & CO. } 747. U. S. circuit court.

Now come the plaintiffs, by the district attorney, and as to the plea herein filed by the defendants, wherein they have put themselves upon the country, they do the like.

And to the further plea herein filed by the defendants, wherein they have put themselves upon the country, the plaintiffs, by the district attorney, do the like.

WARNER M. BATEMAN,
U. S. Att'y.

And afterwards, to wit, this cause progressed from day to day
30 until, to wit, the 25th day of March, in the year last aforesaid, on which day an entry was made upon the journal of said court in said case in the words and figures following, to wit:

Entry.

THE UNITED STATES
vs.
H. D. CHAFFEE & CO. } 747. Debt.

This day again came the parties, by their attorneys, and also the jurors heretofore empaneled and sworn the truth to speak upon the issue joined between the parties in this case, who, upon their oaths, do say that the defendants doth owe to the plaintiffs the sum of two hundred and thirty-five thousand six hundred and eighty dollars, in manner and form as the said plaintiffs hath complained against them, and they assess the damages of the plaintiffs by reason of the detaining the same at one cent; and thereupon the defendants give notice that they will move the court for a new trial.

And afterwards, to wit, on the 29th day of March, in the year last aforesaid, came the defendants, by their attorneys, and filed in the clerk's office of said court their motion for new trial herein, which said motion is in the words and figures following, to wit:

Motion for new trial.

United States circuit court, southern district of Ohio.

UNITED STATES
vs.
H. D. CHAFFEE & CO. } No. 747. Motion for new trial.

And now come the defendants, S. L. Chaffee and Rue P. Hutchins, and move the court to set aside the verdict of the jury and grant a new trial herein for the following reasons:

1st. The court erred in admitting incompetent testimony.
2nd. The court erred in excluding competent testimony.
3d. The charge of the court was contrary to the law.
4th. The verdict of the jury was contrary to the weight of evidence.
5th. The verdict of the jury was contrary to the law.
6th. Newly discovered evidence.
7th. And for other errors.

HOADLY, JACKSON & JOHNSON,
FOLLETT & WRIGHT, *For Def't.*

And afterwards, to wit, on the 1st day of April, in the year last aforesaid, an entry was made upon the journal of said court in said case in the words and figures following, to wit:

Entry.

THE UNITED STATES OF AMERICA
vs.
SIDNEY L. CHAFFEE & RUE P. HUTCHINS. } 747. In debt.

And now come the defendants aforesaid, by their counsel, George Hoadly, esq'r', and move the court to extend time for the preparation and settlement of a bill of exceptions, until the last day of the next April term, which motion is granted.

And afterwards, to wit, on the 1st day of April, in the year last aforesaid, an entry was made upon the journal of said court in said case in the words and figures following, to wit:

31 *Entry.*

UNITED STATES OF AMERICA
vs.
SIDNEY L. CHAFFEE & RUE P. HUTCHINS. } 747. In debt.

And now on motion of George Hoadly, esq'r, of counsel for the defendants, the motion for new trial, made by the defendants Sidney L. Chaffee and Rue P. Hutchins, on March 29, 1870, and now pending, is continued for argument at the next term; and the said defendants present their bill of exceptions, which is allowed, signed, sealed, and ordered to be made part of the record; and the defendants also move the court in arrest of judgment, which motion is also continued for argument at the next term.

And afterwards, to wit, on the same day, and in the year last aforesaid, an entry was made upon the journal of said court, in said case, in the words and figures following, to wit:

Entry.—Judgment on the verdict.

THE UNITED STATES OF AMERICA
vs.
SIDNEY L. CHAFFEE & RUE P. HUTCHINS. } 747. In debt.

This day came the parties, by their attorneys, and the plaintiff, by its attorneys, moved the court, that judgment be entered on the verdict heretofore rendered herein, at the present term; which motion was argued by counsel, and, upon consideration thereof, the court grant said motion: Therefore it is considered by the court that the plaintiff, the United States of America, recover against the defendants, Sidney L. Chaffee and Rue P. Hutchins, the said debt of two hundred and thirty-five thousand six hundred and eighty dollars, which, by the jury aforesaid, is found the said Sidney L. Chaffee and Rue P. Hutchins, by force of the statute aforesaid, have forfeited and owe
32 to said United States, and also one cent, the damages assessed as aforesaid, for the detention thereof, together with the costs of said United States in this behalf expended, and execution awarded for said debt, damages, and costs.

And afterwards, to wit, on the 3d day of June, in the year last aforesaid, an entry was made upon the journal of said court, in said case, in the words and figures following, to wit:

Entry.

THE UNITED STATES
vs.
S. L. CHAFFEE & R. P. HUTCHINS. } 747. Debt.

This day came the parties, by their attorneys, and thereupon this case came on to be heard upon the motion in arrest of judgment, and for a

new trial, and was argued by counsel; and counsel not having concluded their arguments, the further hearing of this case on said motion was postponed until to-morrow morning at ten o'clock.

And afterwards the hearing of this case on said motions progressed from day to day, until, to wit, the 7th day of June, in the year last aforesaid, on which day an entry was made upon the journal of said court therein, in the words and figures following, to wit:

Entry.

THE UNITED STATES
vs.
SIDNEY L. CHAFFEE ET AL. } 747. Debt.

This day again came the parties, by their attorneys, and having concluded their arguments, the court took the case under advisement.

And afterwards, to wit, on the 1st day of July, at said April term, in the year last aforesaid, came the parties, by their attorneys, and filed in the clerk's office of said court a certain bill of exceptions herein,
33 which said bill of exceptions is in the words and figures following, to wit:

Bill of exceptions.

Circuit court of the United States, southern district of Ohio.

THE UNITED STATES OF AMERICA
vs.
HIGHLAND D. CHAFFEE ET AL.

Be it remembered that, upon the trial of this cause, the plaintiff, for the purpose of proving the quantity of whisky shipped from Tippecanoe, Ohio, by the defendants, between the dates named in the count of the declaration, & to maintain the issue on their part, called, as a witness, Thomas Brown, who, having been duly sworn, testified that, beginning in the spring of 1865, he was for two (2) years collector of tolls on the Miami & Erie Canal at Dayton; that from 1861 to 1865 he was superintendent of said canal; that said canal was leased by the State of Ohio, in 1861, to persons who, with their associates, have been ever since, and still are, in possession of said canal under said lease. In answer to a question, What were the duties of his office, and whether any books were kept in his office? he said a book is always kept in which every clearance of every boat is kept as made. It is called the certificate-book. The entry is made in the book, of the name of the boat, and the name of the captain. I have an abstract of entries which I made from the books with a great deal of care. The books were intended to be regularly kept. They were kept my me and a young man in my employ. The entries were made either in the day or the night. I directed the manner in which it was to be done. It was simply one form, with the exception of the different kinds of freight. As to the source from which I derive my information to make entries, the captains of the boats report
34 when they come into the office for the clearances, and the collector is presumed to know them and generally does. Sometimes a new man comes on a boat; we simply require the name of the boat,

and where she is going to; and if the boat is freighted we ask for the freight-bills, and if he has them these entries are made from them, and sometimes a man calls and says that he has left his bills of lading on the boat, and we take his statement, and if we do not know him well, we say to him to bring his bills in, and sometimes the boat is cleared in the absence of a bill, but not unless we know the man who presents himself at the office; and the witness produced the said certificate-book, said book being composed of certificates, specimens of which being printed blanks, and also of the same when filled up, are as follows:

No. 1. Specimen of blank certificate.

No. .] COLLECTOR'S OFFICE,
Dayton, , 186 .

I, , master of the boat , do certify that the following is a full and true statement of all the cargo taken on board said boat for transportation on her present passage, and that I have paid toll thereon as follows, to wit, to , for original cargo on clearance, No. viz:

No. 2. Specimen of the certificate filled up.

No. .] COLLECTOR'S OFFICE.
Dayton, December 2d, 1865.

I, French, master of the boat A. Hopkins, do certify that the
35 following is a full and true statement of all the cargo taken on board said boat for transportation on her present passage, and that I have paid toll thereon as follows, to wit, to Piqua, for original cargo on clearance, No. 893, viz:

The boat.	From.	To.		Miles.	Tolls.
	Troy	Cincinnati		104	2 06
900 bus. barley	"	"	43,200	"	21 60
	To Daytor.				
50 bbls. H. wines	Tipp	Cin'ti.	18,000		7 20
1,645.29 bus. oats	Troy	"	51,314	86	18 68
					25 88

H. U. FRENCH.

On being asked just what the entries show, the witness said: Well, this is a clearance for 900 bushels of barley, 50 barrels of high wines, and 1,645.29 bushels of oats, (being the one next herein above copied.) We give the captain a paper just as shown on the books. It is called a clearance, and he has to present it at the locks on the canal. Each of these certificates is signed by the captain, on the book, when it is made.

Counsel for the Government then offered in evidence the entries on the book mentioned in the abstract prepared by the witness, and the abstract itself as an index to said entries. Counsel for the defendants objected, and proceed to cross-examine the witness, who testified as follows:

The canal was owned or controlled by the lessees of the board of public works. The lessees are a partnership, and leased the canal from the State. While I was collector, I was in my office perhaps one-half the time. The entries in the book were mostly made by a young man I had employed. The source from which he got his information to make the entries was from the statements of the captains or the bills of
36 lading. The most frequent way was from the bills of lading. Sometimes a captain would say that he had no bill of lading. I once turned a captain back that had no bill of lading. A captain whom we knew that we could take his word, we would make the entry from his statement without a bill of lading. We did not often inspect the freight. It is part of the duties of the collector to inspect freight, but we do not deem it necessary when bills of lading are presented. The most that the collector inspects freight, is when the boat is unloading. The captain presents his clearance at Dayton and Cincinnati; and when the boat is unloading it is the duty of the collector to see that the captain has given in his freight correctly; and if he sees any freight that is not on the clearance, he then brings the captain to an account for it. The only means I had of knowing where this freight came from, was the bills of lading or the statements of the captains. The bills of lading always show where the freight came from, or was received on the boat. That will have to be explained. Not only when freight came from Tippecanoe, but from other places, we would indicate on the book in one of two ways, where it came from. We might say "Tippecanoe," but that not being a very important point, we might say, "way," but the miles are always given. If from Tippecanoe, the entry at Dayton would be "Way, 15 miles," that being the distance from Tippecanoe to Dayton.

On re-examination the witness said canal-boat captains applying for a clearance always inform the collector from what point the boat comes. I do not recollect the provisions of the canal-law as to penalties for violations of duty by captains. The law allows a collector, if he doubts the statement of a captain, to swear him, either as to the point from which he came, or any other matter. The number of miles the freight is billed or freighted is always entered. If from Tippecanoe to Day-
37 ton they say fifteen miles; if, from Tippecanoe to Cincinnati they say eighty miles. The young man I had in my employ as clerk was named Thomas Kauffman. He is dead. I know his handwriting very well. If there are any other entries in the handwriting of any other person than Kauffman and myself, they are in the handwriting of T. B. Stevenson, my grandson, who was in the office, and his entries are always reliable. This abstract is in my own handwriting. The first entry is December 2d, 1865, and it comes down to September 10th, 1866. I made it out from an examination of the books when this suit was tried before.

The witness also testified that the first distillery on the canal north of Dayton was Smith's, seven (7) miles from Dayton; the next one Chaffee's at Tippecanoe, fifteen miles north of Dayton; the next one not on the canal, but not far from it, two miles from Troy and three miles from Tippecanoe; the next Farrington and Slausson's somewhere above Tippecanoe and south of Piqua on the canal. And the witness also produced an abstract, which is hereto attached, marked A, and therefore made a part of this bill of exceptions, which was admitted to be used as

an index to said book; and it is now admitted that the several portions of said book offered in evidence by the Government were in all respect similar to the last one hereinabove copied, except so far as otherwise described in said abstract, marked A.

Counsel for the Government then offered in evidence the entries mentioned in the abstract as an index to the entries, agreeing to complete the testimony as to the entries made by Stevenson, and if they failed to do so, that the same might be ruled out.

Counsel for the defendants objected to the evidence on the ground that it was hearsay, and res inter alios acta, which objection was over-
38 ruled and this evidence admitted not as evidence that whisky came from or belonged to the def'ts, but only as competent to show that a given quantity passed a certain point on a given day, and if the Government did not connect this whiksy with the defendants the testimony would be stricken out. To which ruling the defendants then and there excepted.

Mr. Brown was afterwards recalled and testified that two of the entries, to wit, Dec. 6 and 31, 1865, were in the handwriting of his grandson, T. B. Stevenson.

After the completion of Brown's testimony the court suggested that it would be a useless consumption of time to go over the same grounds with the other collectors as to the mode of doing business in their office, and suggested to counsel that they might agree that the testimony of the collectors on this subject would be substantially the same as that of Mr. Brown's, and counsel for the Government, and the defendants thereupon made the agreement suggested by the court.

And thereupon, for the purposes aforesaid, and further to sustain the issues on its part, the Government called as a witness James Carson, who, being duly sworn, testified that he is, and has been since 1864, collector of tolls on the Miami & Erie Canal at Piqua, Ohio, and the witness produced a book containing certificates made by filling printed blanks, the said printed blanks being exactly similar to those in use at Dayton and Cincinnati, as aforesaid, and the blanks being filled up and signed in the same manner as was done in the case of the certificates produced by the witness Brown, and the witness also produced an abstract hereto attached, marked "B," and therefore made a part of this bill of exceptions, which abstract was admitted merely as an index, so as to identify the portions of the book so offered in evidence by the Government, which parts so offered it is now admitted are precisely similar to
39 the specimen last hereinbefore copied from the Dayton book of certificates, with such differences only as are indicated in said abstract. And the witness further testified that he had no personal knowledge of the truth of the statements in the certificates. That the entries on his book referred to in his abstract were all made by himself. That he got all the entries from the bills of lading. That he did not like to take the captain's word, although he had sometimes done it; that the bills of lading always showed who shipped the freight; but he did not enter the shipper's name on his books, nor keep any memorandum of it, and that he believed the entries on his books were correct. The witness also testified that Farrington and Slausson's distillery is three miles from Piqua, south; that between Piqua and Tippecanoe, a Mr. Culbertson had a large distillery, but not upon the canal; that witness knew of no other distillery between Piqua & Tippecanoe.

And thereupon the Government, for the purposes aforesaid offered in evidence the portions of said book produced by the said Carson, described in Exhibit "B," to which the defendant objected, alleging as a

reason that said testimony was hearsay & res inter alios acta, but the court overruled the objection, making the same ruling as in reference to the testimony of Brown, and the canal-books introduced in connection with his testimony; to which the defendants excepted.

And the Government for the purposes aforesaid called as a witness William M. Messerole, who, having been duly sworn, testified that he is and has been for nearly ten (10) years collector of tolls on the Miami & Erie Canal at Cincinnati, Ohio, and he produced a book and testified that said book was a record made by him of the arrivals of canal-boats upon said canal at Cincinnati, Ohio; that said records consisted of unsigned certificates printed in blank precisely similar to the blank
40 produced by the witness Brown, and heretofore copied, which blanks were, upon the arrival of each boat, filled up by him so as to show the articles composing the cargo, the place of departure of the boat, the number of miles such cargo had been transported, and the proper amount of tolls chargeable therefor, of which certificate when completed the following is a specimen:

No.] COLLECTOR'S OFFICE,
Cincinnati, July 21, 1866.

I, , master of the boat Marie Louisa, do certify that the following is a full and true statement of all the cargo taken on board said boat for transportation on her present passage, and that I have paid toll thereon as follows, to wit, to Dayton for original cargo on clearance No. 424, viz:

The boat.	From.	To.		Miles.	Tolls.
	Way to way.	Cin.	.....	95	2 38
150 bbls. H. wines	" 52,500	"			
100 " flour	" 21,600	"			
			74,100	80	29 64
725 bus. s. corn	"	"	40,500	80	13 83
Ship-stuff	"	"	14,000	80	5 69
					51 45

And he also produced an abstract, which is hereto annexed marked "C," and therefore made a part of this bill of exceptions, which was received in evidence as an index to the portions of said book offered for the Government, and it is now admitted that the other certificates in said book offered in evidence for the Government are exactly similar to the last one herein above copied, with such differences only as are indicated upon such abstract.

Captain Messerole also testified that the entries in his abstract were entries of clearances of whisky from Tippecanoe to Cincinnati. That the word "Tippecanoe" was used most generally.
41 There are three items entered "Way," and the distance "80 miles," where it came from. That "Way, 80 miles" means Tippecanoe, as Tippecanoe is eighty miles from Cincinnati.

On cross-examination he also stated that Tippecanoe is between two clearance-offices; the nearest office north being Piqua, and the nearest office south being Dayton. That goods shipped from Tippecanoe south would properly get their clearance at Dayton; that the captain of the boat should report such freight at Dayton. That any freight taken after leaving Dayton would be reported at Cincinnati. That the captain would come with the clearances from the other offices to the office

at Cincinnati, and if any mistake had been made in the tolls paid at the other offices it would there be corrected; and that the amount paid at each office would be a check on the other; that it would not be possible to get through the Dayton office without a clearance unless the boat passed through in the night, as it is the captain's duty to stop and pay his tolls, and this the law compels him to do; that the toll on the whisky mentioned in the entries on the abstract made by the witness was all paid at the Dayton office, as it all went through the Dayton office.

On re-examination, the witness said that whisky which had gone through the Dayton office came to his office if it arrived in Cincinnati; and that the Cincinnati office acted as a check on the Dayton office, That if any mistake was made, as for instance in the number of packages, or if any freight was taken on after leaving our office, it was collected at the next office under the head of additional freight. That if freight passed through the Dayton office, for a point not far from Dayton, the collector would not issue a clearance for such freight, but would give a permit; that this permit would be entered on the clearance, and on the collector's books; that collectors are not required to give
42 clearances where the freight does not pass through another office. That there are several entries on Mr. Brown's abstract marked "Dayton permit." That these entries do not appear on the books of the collector's office at Cincinnati, because the boats did not come to Cincinnati; and that for all the entries on Mr. Brown's abstract, except those marked "Dayton permit," there are corresponding entries on the books of the collector's office in Cincinnati. And the Government for the purposes aforesaid offered in evidence the portions of said book produced by the witness Messerole, and described in Exhibit "C," to which the defendants objected and alleged as reasons that said testimony was hearsay and res inter alios acta, but the court overruled the objection making the same ruling as before; to which the defendants then and there excepted.

T. B. Stevenson testified that he was the grandson of Thomas Brown, the collector of tolls at Dayton, and assisted him in his office. That the entries on the Dayton collector's book of December 6th and December 30th, 1865, are in the handwriting of the witness, and were made by him. That he got the facts composing the entries from the captains of the canal-boats, and did not go to look at the freight upon the boat; that he only knew where the freight came from, by informatiun from the captains. That the entry under date of March 31st, 1866, of the canal-boat State Bank, purporting to be signed by Cottrel as captain, he believes to be in Kaufman's handwriting; and that the signature is also in his writing. The collector or his clerk sometimes signed for the captain.

A. Cotterell testified that, in 1865 and 1866, he was captain of the canal-boat State Bank, and transported whisky from the distillery of S. L. Chaffee & Bro. and H. D. Chaffee & Co. at Tippecanoe at different times to Dayton, Cincinnati, and Piqua. That the Chaffee distillery was 25 or 30 feet from the canal; and the whisky was rolled from
43 the distillery to the boat. That he knew all the parties who owned the distillery. That the firm paid the freight for the whisky; that the canal-boat State Bank was afterward transferred to J. Sullivan; after the transfer I am not positive whether I left the boat at Tippecanoe or made a trip on her; but think I made the trip to Dayton; there were 156 barrels of whisky on board from the Chaffee distillery, which went to the Little Miami Railroad at Dayton. At the time I took the whisky to Farrington & Slosson at Piqua, after I had got it on board I met Mr.

H. D. Chaffee; Mr. Shields was store-keeper at the time, and Mr. Chaffee said to me that if Mr. Shields or any one else asked me how many barrels I had on board, to tell them I had on 295 or 298 barrels. At the time I had on 304 barrels.

On cross-examination the witness said that on the trip last mentioned he accounted for and paid toll on 304 barrels, and gave the true amount whenever asked. That on the trip, when the 156 barrels were carried to Dayton, he did not go as captain or pay the tolls. That Sullivan paid the tolls. That the signature to the entry on the collector's book at Dayton, dated March 31, 1866, is not in the handwriting of the witness.

On re-examination the witness said that canal-boats are registered under the State law. That he does not know whether his name had been changed to Sullivan's as captain of the boat, when the 156 barrels were carried to Dayton. That the collector sometimes signs the entry on the book for the captain in his presence.

This witness being recalled testified that he had never known of any whisky being shipped from Tippecanoe except from the Chaffee distillery.

Other canal-boat captains testified to carrying whisky on their boats from the Chaffee distillery at different times in the years 1865 and
44 1866; and that they had never known of any whisky being shipped from Tippecanoe except from the Chaffee distillery. Testimony was also introduced of witnesses residing at Tippecanoe in the years 1865 and 1866, tending to prove that the Chaffee distillery was the only distillery there. That there was a brewery in Tippecanoe, at which occasionally a few barrels of whisky were distilled from beer which had soured. That whisky was shipped by canal from the Chaffee distillery, and that the witnesses had never known of any whisky being shipped from Tippecanoe except from the Chaffee distillery, but the said witnesses did not state the quantities of such whisky as shipped from the Chaffee distillery.

It was admitted on the part of the Government that the evidence showed the receipt by consignees of the whisky mentioned in the 1st, 2d, 3d, 7th, 15th, 17th, & 18th items of Brown's abstract; and that the defendants, if charged with that whisky on the evidence of the consignees, should not be again charged with it, by the testimony of Brown, and the entries in his books. It was also admitted that all the entries on Messerole's abstract, except the 11th, 12th, and 13th, were duplicates of entries on Brown's abstract; and that the defendants could only be charged with those three items by the testimony of Messerole and the entries in his books; and it was admitted that the evidence showed the receipt by consignees of the whisky mentioned in the 1st, 2d, 3d, 4th, 5th, and 8th items of Carson's abstract, and that the defendants, if charged with that whisky on the evidence of consignees, should not be again charged with it on the testimony of Carson and the entries on his books.

The defendants offered no testimony tending to prove what shipments of whisky were made by them during the time in controversy; nor to prove that any of the whisky appearing in the entries on the
45 canal-collectors' books at Dayton, Cincinnati, or Piqua, which were offered in evidence was not shipped by them, nor that there were duplications in the evidence other than those admitted by the Government as above stated.

And the Government also, for the purposes aforesaid, offered evidence tending to prove that between the dates named in the third (3) count

of the declaration (the 1st and 2d counts of the declaration having been abandoned by the Government) there were received and sold for the account of the defendants by sundry consignees at Cincinnati, Baltimore, Philadelphia, and elsewhere, 5,529 barrels of whisky or high wines. And the Government for the same purpose offered evidence tending to prove that the Miami & Erie Canal extended from Cincinnati northwardly through Dayton, Tippecanoe, Troy, Piqua, to Toledo; that the Cincinnati, Hamilton & Dayton Railroad extends from Cincinnati northwardly to Dayton and is run in close connection and under the same management with the Dayton & Michigan Railroad, which extends from Dayton northwardly through Tippecanoe, Troy, and Piqua, to Toledo. That at Dayton a branch of the Little Miami Railroad runs eastwardly to Xenia, connecting with the Little Miami Railroad at Xenia, from whence the main line of said road extends southwardly to Cincinnati and eastwardly to Columbus, connecting at Columbus with other lines of rail extending to Philadelphia and Baltimore. That at Piqua the Dayton & Michigan Railroad is intersected by the Columbus, Chicago, and Indiana Central Railroad, which extends eastwardly to Columbus, there connecting with lines of rail to Philadelphia and Baltimore, and the Government offered evidence tending to show that between the dates named in the 3d count of the declaration there were shipped by rail by the said railroad as follows:

46 From Tippecanoe over Dayton & Michigan Railroad, both ways, 1,468 barrels, of which 409 barrels went no further than Piqua on said road.

From Piqua over the Columbus, Chicago & Indiana Central Railroad, 1,490 barrels.

From Dayton over the Little Miami Railroad, 537 barrels.

That there was received from said defendants by the Cincinnati, Hamilton & Dayton Railroad at Dayton, 2 barrels, and by the same railroad at Cincinnati, 1,008 barrels; that the said testimony of said shipments and receipts, consisted of the way-bills accompanying the shipments, which way-bills, were proved to have been made in the regular course of business by clerks in the employ of said railroad companies, and it was proved that each way-bill contained a true statement of the date of the shipment, the name of the railroad, the nature and quantity of the freight, and to whom and to what place the same was consigned, and that the way-bills offered in evidence, also, contained a statement of the names of the consignors. Some of said clerks were dead and whose handwriting was proved; others of whom are living and were produced; which way-bills were in the following form:

432.] DAYTON, *June* 25, 1866.

L. M. Pitsburgh, via Steub. & P. Handle.

H. D. CHAFFEE & CO., 106 "A."
J. P. Bankson, 60 b'r'ls whisky.

Philadelphia, Pa., 21,000,	21	4,410	400
Pitts. to Philadelphia	26½		
	47½		

47 the other varying therefrom only in the name of the consignee, amount of whisky, and date of shipment; and to the admission of each and every one of said way-bills the defendants severally objected, but the court admitted each of said way-bills, and permitted them to be read to the jury, making the same ruling as before; to which ac-

tion of the court the defendants excepted, and the Government gave other evidence tending to connect the said shipments stated on said way-bills with the defendants.

And the Government further offered evidence tending to prove that between the dates named in the 3d count of the declaration the defendants paid taxes in full on 6,045 barrels of whisky, manufactured by them during said time, namely $622,781.

And the Government, except as hereinbefore stated, called as witnesses and examined none of the persons whose names are signed to the several certificates in the books produced by the witnesses, Brown and Carson, as to the genuineness of such signatures, nor was proof given of the death or hand-writing of any of them. Some, but not all, of said captains, were examined as witnesses & testified to the carriage of whisky from Chaffee's distillery on their boats at dates corresponding, & of quantities corresponding, to the several certificates by such captains signed. And the Government also offered evidence tending to prove that the distillery of H. D. Chaffee & Co., at Tippecanoe, between the dates named in the 3d count of the declaration was of a capacity equal to a production of fifty (50) barrels of whisky per day when run to its fullest capacity, and the Government also offered evidence tending to show that H. D. Chaffee, S. L. Chaffee, and Rue P. Hutchins, between the dates named in the 3d count of the declaration, were in copartnership as distillers at Tippecanoe aforesaid, but as to William M. Chaffee named in the declaration, no proof was given tending to show
48 that he was a partner in said firm, and the Government abandoned its claim against him, and caused said abandonment to be noted on the journals of the court, and it was also proved that H. D. Chaffee had departed this life since the commencement of this suit; that he was the financier and book-keeper of the firm.

The defendant moved to exclude each and every certificate of each canal-book, and each parcel of the bills of lading upon the ground that they were hearsay testimony, and transactions between other parties, and also, that they had not been connected with the defendants in this case, and it was understood that such motion applied to each certificate in each book, and each parcel in each bill of lading severally, the defendants being accorded the liberty during the summing up to the jury to call the court's attention to any particular entry in the canal-books or to any particular bill of lading in any parcel and move for its exclusion. The court refused to exclude any one of the certificates in any one of the canal-books, or any of the parcels of the bills of lading, deciding that the question of how far they were connected with the defendants was for the jury, and holding there was in this regard some evidence; to which ruling and action of the court the defendants at the time excepted.

Evidence was also offered by the Government tending to prove that prior to the 26th day of October, 1865, the distillery at Tippecanoe was owned and run by Sidney L. Chaffee and Highland D. Chaffee, as partners under the firm-name of S. L. Chaffee & Bro. That on said 26 day of October Rue P. Hutchins purchased an interest in the property and business including the whisky on hand, and was admitted into the partnership, and that the firm-name was changed to H. D. Chaffee & Co. That on the 1st day of September, 1866, William M. Chaffee purchased
49 an interest in the property and business, excluding the whisky on hand, and was admitted into the partnership, and that the firm name was charged to Chaffee & Co. That the distilery stopped running on the 1st of July, 1864, and with the exception of a few days in the latter part

of December, 1864, that it did not run again until the 26 of October, 1865. It was admitted by the Government that the tax was paid on whatever whisky was on hand on the 26 of October, 1865, and that the claim of the Government to recover for whisky in the possession of the defendants with the intent to avoid the payment of the tax on the same was limited to the period between the 26 of October, 1865, and the first of September, 1866.

For the purpose of showing the quantity of whisky on hand on the 26th of October, 1865, the defendants offered the evidence of twenty-three witnesses, some of whom were at different times employed about the distillery; others had gone there on business, and others of whom had passed the distillery. The testimony of these witnesses tended to prove that, on the 1st day of July, 1864, when the distillery stopped, there was a large quantity of whisky on hand, which was stored in the cellar, in the two grain-rooms, in the corn-crib, on the bank of the canal, and along the fence in the rear of the distillery; that this whisky, or the greater part of it, remained on the premises until the 26th of October, 1865, the several witnesses testifying to seeing it at different times from the 1st of July, 1864, until the 26th of October, 1865. None of the witnesses, however, counted the number of barrels, or made any memorandum of their estimates of the quantity; but they spoke from recollection merely. And they differed in their estimates of the quantity in the several places above named, and of the aggregate amount. Some of these witnesses testified to whisky being shipped in the spring and summer of 1865, but they could not tell what quantity was shipped.

50 The Government, in rebuttal, offered the evidence of eleven witnesses, some of whom were at different times employed about the distillery, or had gone there on business, and others of whom had merely passed the distillery, or happened to be there without business. The testimony of these witnesses tended to prove that, from the 1st of July, 1864, to the summer of 1865, there was less whisky at the distillery than was claimed by the defendants and testified to by their witnesses; and that, in the fall of 1865, up to the 26th day of October, there was little if any whisky at the distillery. And among these witnesses called by the Government was James M. Dye, who testified that he had sold his corn to the Chaffees, at their distillery, ever since they were in business; that he generally transacted his business with S. L. Chaffee; that, in the fall of 1865, he was there, and passed through the distillery; that he did not think there was any whisky there then; that Mr. S. L. Chaffee told him the whisky was all gone, except about 80 barrels, which they had run off to use up the grain.

Among the witnesses called by the defendants to testify to the quantity of whisky on hand from the 1st of July, 1864, to the 26th of October, 1865, was William M. Chaffee. On cross-examination he testified that H. D. Chaffee was the book-keeper of the firm of H. D. Chaffee & Co.; that they kept ordinary books of accounts, naming day-books, journals, and ledgers; that when he purchased an interest in the distillery and went into the partnership on the 1st of September, 1866, an inventory was taken of the property that he purchased an interest in; that he thought an inventory was also taken of the whisky on hand, but he did not purchase any interest in that, and was not sure that an inventory of it was made.

The Government also offered evidence tending to prove that S. L. Chaffee lived in Tippecanoe, and was about the distillery most of

51 the time, and attended to making purchases and to other business of the firm of H. D. Chaffee & Co., and that Rue P. Hutchins,

during the time he was a partner, was employed about the distillery.

S. L. Chaffee was present in court during the entire trial, and Rue P. Hutchins was in court at the close of the defendant's testimony. Before the commencement of the trial, to wit, on the third day of March, 1870, the Government caused a notice to be served on the counsel for the defendants, of which a copy is hereto annexed, marked Exhibit D. At the close of the defendants' testimony, the books and papers mentioned in said notice not having been produced, counsel for the Government called for their production, and the counsel for the defendants made a statement as to what had become of the books of H. D. Chaffee & Co. But counsel for the Government objected to said statement, and asked that the books and papers should be produced, and that S. L. Chaffee should be called as a witness for the defence to explain why they were not produced, and to testify generally in the case. Counsel for the defendants did not produce said books and papers, and did not call either S. L. Chaffee or Rue P. Hutchins as a witness in the case.

And thereupon the cause was argued to the jury, & during the argument of defendant's counsel their attention was called by the court to an entry in the mash-book as requiring explanation, & they were told by the court that, if they desired, a witness might be put upon the stand for that purpose, the court remarking that they would always interrupt the trial at any stage, even during the argument, to allow testimony to be introduced by way of explanation or to supply an omission.

And thereupon, the cause having been argued to the jury by both parties, and neither party having asked any special instruction, although asked by the court if they desired such, the court proceeded to
52 charge the jury as follows:

GENTLEMEN OF THE JURY: I have no doubt that it will cause common congratulation that this very long and tedious trial is drawing so near its close. We have detained you only some eleven and a half working-days, enabling the court and the jury in the intervals, I trust, to be relieved, not only from the irksomeness of the trial, but the disadvantages of continuous absence from other duties. High praise is due to counsel for this. Much has been gained in time by concessions which we had no right, in law, to call upon them to make; and it is gratifying to the court in looking over the trial to feel entire confidence that no one fact has been omitted which more time would have developed. We know just as much about the case as if we had, as on the former trial, consumed five weeks in its investigation. Certainly the zeal and the untiring industry of the defendants' counsel exclude every complaint on the part of their clients; and I need not say that I think the Government has nothing to complain of in view of what its learned counsel has done.

The issues before you are very much simplified by the mutual admission that the time within which this wrong has been committed is between October, 1865, and September, 1866, a period of about ten months. It is also conceded that the amount of whisky on hand in October shall be credited to the defendants; that is, the Government must show not only that they have sold more during the ten months than they paid tax on, but also than this amount when added to that which they had on hand. It is not quite so simple as this, because you will take into consideration whether at the expiration of this period they still had on hand some portion of that which they possessed in October, 1865. In round numbers, I think the proof clearly shows—and perhaps it may be
53 stated as a concession—that the tax has been paid on about 6,000 barrels. The Government claims to show a sale of about

9,000, showing a surplus of some 3,000 barrels, or, in round numbers, some 188,000 gallons, on which the claim of the Government for tax and penalty is about $750,000. That is the Government's claim. The defendants reply that it is admitted they have paid taxes on some 6,000; that they prove they had on hand some 2,000 or 2,500 barrels, and, although this would leave a balance of illicit whisky to be accounted for, still they insist the Government has failed to show the manufacture of the whole amount of 9,000 barrels, and that after a fair balancing of testimony, the jury ought to find that the defendants sold no whisky whatever in violation of law.

In a general way the Government have shown by the consignees' testimony some 6,000 barrels, and by the way-bills and canal-books some 3,000, making up the 9,000. They claim to show by the mash-book the capacity of the distillery to be somewhere in the vicinity of double that necessary to produce the quantity which they actually paid a tax on. By consultation of this book is seems the average run of the distillery during the ten months as reported was about four hundred bushels; and turning to the earlier stages of its operations we find many months when it was seven and eight hundred and more bushels. It is for you to say, from the testimony, whether the capacity of the distillery was or was not what the Government claims it to be. If you so find it, you will then come to the conclusion that there was power on the part of the defendants to commit the offense with which they are charged. It is claimed that the evidence of these consignees, and especially the testimony of the way-bills, is very delusive; that it tends to duplication, and that you will be very likely to charge these defendants twice
54 over with the same amount. So far as the nature of this testimony is concerned there has been, in modern times, a very great change of opinion; and I do not know that if I should search all the books I ever read, or call to mind all my experience at the bar, I could select a more fitting instance to illustrate my own opinion of the respective values of these two classes of testimony than the contrast between the persuasive effect of memoranda, made in the ordinary course of business by those who have no motive to falsify—whose duty it was to record them at the time the transactions took place—on the one hand, and on the other the grossly conflicting verbal testimony given in this cause as to the amount of whisky on hand in October, 1865. Compare the two and see upon which, in its own nature, as men of common sense, you can repose your credence with most confidence. The one is plain, simple, and direct, without a motive of falsification. The other presents a spectacle like this: A phalanx of twenty men swearing on their oaths to some two thousand barrels of whisky, at a given time, in a given place, and two-thirds as many, equally intelligent and equally respectable, with equal opportunities of knowledge, swearing there is not fifty barrels there. It is a hapless conflict, leaving the mind in uncertainty, with nothing whatever to rest upon.

It is, however, before you, and you will look carefully over its details, give due weight to the ingenious and able criticisms which have been made by the distinguished counsel for the defendants. Give the same consideration to that which has been given by the learned counsel for the Government, and resting there, stopping with the proof put in on the part of the Government, say whether, if the defendants had given
no proof whatever, you believe a plausible, reasonably proved
55 case was made out. Would you have felt at liberty on your oaths to have acquitted the defendants, if they had given no proof whatever? If you will pursue this order of investigation, it will

enable you, I think, more easily to follow that course, which, in my estimation, is demanded by well-settled principles in the law of evidence. The first question which arises is, do you believe the consignees? They are wholly unimpeached. We have no suggestions made by the defendants, either by argument or by evidence, that they swore untruly. The only liability to error is the danger of duplication. The way-bills, the railroad shipments, the canal-books, are attacked, not so much on account of what they say, as the danger that they may speak twice upon the same subject. But it would seem to me that such a mistake is wholly unnecessary. The date, the quantities shipped, the shipments themselves, the consignees' names, all unite in preventing confusion. After much reflection, I am unable to call to mind any direction whatever which it is my duty to give you in estimating this testimony. I am asked for none whatever on the part of the defendants. It seems plain and direct. The utmost which counsel have said of it is, that it lacks that demonstrative certainty; that it is not that full proof which the law demands in an action so highly penal at this. Gentlemen, this may be most fully conceded, and still the Government be entitled to your verdict. The proof in the outset may be defective, it may not be sufficient to enable you, without any doubt or hesitation, to find against the defendants, and still it may be your duty, nevertheless, so to find. For although I instruct you fully that the case must be made out beyond all reasonable doubt in this as well as in criminal cases, yet the course of the defendants may have supplied in the presumptions of law all which this stringent rule demands, in determining, therefore, in
56 the outset, whether a case is established by the Government, you will dismiss from your minds the perplexing question, whether it is so made out beyond all doubt. It need not, in the exigencies of this case, be so proved in order to throw the burden of explanation upon the defendant, if from the facts you believe he has within his reach that power. In the end, all reasonable doubt must be removed, but here, at this stage, you need say only, is the case so far established as to call for explanation? An illustration of the rule you will apply here may be found in the case of a prisoner. The Government proves that a recently stolen watch in his possession; that he had opportunity to steal it, and that he might, if he would, show from whom he obtained it. Although it is true that you could not convict of larceny unless the testimony was free from doubt, still the wilfull refusal of the prisoner to explain the suspicious circumstances, &c., make it your duty to convict, unless there was something in the evidence to cast doubt over the proof of the Government. If, then, you conclude that, unexplained and uncontroverted by any testimony, the opening proof would enable you to find against the defendants for the claim of the Government, or any material part of it, you will then take up their testimony in view of the principle which has been so much discussed, and which the court announced at an earlier part of the trial. Although the counsel for the defense, when this principle was announced, with spirit and energy, begged leave to differ with the court in reference to the effect of not producing the books, and not swearing the defendant, still the presumption of law is that client and counsel have deliberately and with full knowledge of the law and all its presumptions elected to withhold this proof, and you will not in the smallest degree abate the full application of the principle on any notion that it may have been mis-
57 apprehended. The rule is one which I am confident will commend itself to your common reason. It is this: Without exception, where a party has proof in his power which, if produced, would

render certain material facts, the law presumes against a party who omits it, and authorizes a jury to resolve all doubts adversely to his defense. The same rule is applicable in a case where a party once had proof in his power which has been voluntarily destroyed or placed beyond his reach.

This brief announcement of a rule is all which is usual from the bench to a jury, the law assuming that it will be received with unquestioning confidence. But I have a motive, which it is unnecessary to explain, for reading it as described and applied by a few authors and judges. They have been selected with reference to their applicability to this cause. Not that you, gentlemen, are concerned with them, but for the convenience of counsel, only, I will announce the books and pages from which I read.

Stark, (Evidence,) 817: "In all criminal cases the guilt must be most fully proved. No weight of preponderance is sufficient unless it generate full belief of the fact beyond all reasonable doubt."

This strong rule, gentlemen, is applicable in the case before you.

But the author adds, on the following page, (820:) "In criminal cases, the proof should be of a conclusive character. But here, it is to be observed, that it frequently happens in criminal as in civil proceedings, that evidence which is in itself inconclusive derives a conclusive quality from mere defect of proof on the part of the adversary, or of the accused."

And in the next paragraph, he says: "A party being apprised of evidence, and has the means of explanation in his power and
58 does not make it, the strongest presumption arises that the charge or claim is well founded. It would be contrary to all experience of human nature and conduct to come to any other conclusion."

4 Howard, Sup. Ct. Report, page 242, in a revenue case, and in reference to circumstances much like these this jury has to consider, it is said: "Under these circumstances the claimant was called upon by the strongest consideration, personal and legal argument, to bring to his defense the best evidence under his control." They add, (p. 248:) "Practical illustrations of this rule are witnessed daily, in criminal cases, and are too familiar to require more particular reference."

In a recent case, in the southern district of New York, Internal Revenue Record, page 11, when in a similar case the defendant had refused his books and neglected to testify, Judge Blatchford said to the jury: "If a party has the power of clearing up a doubtful point and does not do it, but instead resorts to all sorts of evidence, except the direct evidence he himself could give, any doubt must be resolved most strongly against him."

He then proceeds to apply the rule to the refusal of defendants to testify in reference to imputed conversations, because, he says, they could testify in their own case.

Illustrations from criminal trials were given of how proofs creating only strong suspicion of guilt deserved that degree of conclusiveness demanded by the law for conviction if a prisoner failed to make explanation when such explanation was in his power. His honor then proceeded as follows:

As Judge Blatchford applies this principle to a defendant, who, in a case strikingly like this one, refused to contradict, under oath, a witness
59 who swore to his confessions, I will, in connection with what he says, although somewhat out of the order I am following, ask your attention to what one of the Government witnesses testified

in reference to the defendant's admissions. He said the defendant told him, at the distillery, that he had little or no whisky there, some time in 1865. He testifies that in open court. The defendant sat by and heard it, but made no denial. It is not a matter for the jury to say that they will indulge in vague surmises in reference to the possibility of the witness being mistaken. The law, acting upon well-settled principles of common reason, says that when such testimony is given and the defendant is by and makes no denial, all doubts are resolved against him.

Mr. FOLLETT. I would wish to state to your honor right there that this testimony was given in rebuttal, if your honor will recollect.

COURT. That makes no difference whatever. That testimony could not have been put in chief because it was not then applicable to the exigencies of the case. It was put in rebuttal, as the learned counsel well suggests, and to rebut what? They had introduced some twenty-three witnesses who testified vaguely and loosely to estimates of whisky on hand, referring to anterior periods, endeavoring to recollect the observations which they then made; and to rebut that the Government called a witness who said: "I conversed with the defendant at the distillery, and he told me he had little or no whisky there." Whether it is put in in rebuttal or in chief has no significancy whatever in reference to the application of this principle of presumption.

It is for you to say whether the defendant did or not keep books of account. The testimony, however, upon this point seems to be uncontradicted, and that they consisted of day-books, journals, and ledgers. You will act upon your own business knowledge of what in all probability those books contained. The presumption of law I charge you is, that the defendant did keep the accounts usual and necessary for the
60 correct understanding of so large a business, and the accurate accounting from time to time between the several partners interested in it. I say to you that the books of the firm of which H. D. Chaffee was a member, he being dead, belonged of right, and are assumed to be in the possession of the surviving partners. The law presumes, also, the books to be in existence and accessible to the defendant S. L. Chaffee, and his co-defendants, unless the contrary is shown by the evidence. The declaration of counsel that they are in Buffalo is not evidence of that fact, and if it were would in law constitute no excuse for their non production, without further proof that upon diligent inquiry and effort they could not be produced. If you believe the books were kept which contained the facts necessary to show the real amount of whisky in the hands of the defendants in October, 1865, and the amount which they had sold during the next ten months, or that the defendants or that either of them could by their own oath resolve all doubts on this point, if you believe this, then the circumstances of this case seem to come fully within this most necessary and beneficient rule.

And now, in the light of this rule, let us proceed briefly to consider the defendants' case. And first, I repeat, for the purpose of explanation only, that it is claimed on the part of the defendant, the evidence of the Government is uncertain, and may lead to duplication. Although you are to resolve all doubts against the defendant, this does not mean that, because the plaintiff makes a prima-facie case for $750,000, you are to write that down inexorably, and stop there. It means that if you believe such case is made, you are to start with that, and then carefully consider all the testimony, and so far as you can, from any source, without any doubt or hesitation, mark out any or all of it; that

61 you will so do; where there is certainty, this rule has no application. It is only where it is vague and doubtful that it comes in to relieve you from the doubt and perplexity which the silence of the defendant occasions. I have recurred to this again solely for the purpose of making this explanation.

Let us proceed then with the defendants' case. They say, grant what the Government asserts, that we sold eight or nine thousand barrels of whisky during this time; we show you we paid tax on six thousand barrels, and that we had two thousand or three thousand on hand. How is this proved. Two intelligent parties whom you are warranted in presuming must know with certainty this great leading fact refuse to testify. The law accords to them liberty to speak, and yet they remain silent. The books are also withheld. As a substitute for these sources of certainty, there are produced as witnesses some neighbors of the defendants, grocers, physicians, day-laborers, and farmers, who visited this distillery socially or on business. All these witnesses speak, and to this I ask your particular attention, of subsequent estimates made from recollection, by endeavoring to call to mind quantities which they saw at past periods. They differed greatly in their general aggregate, and still more so in the amounts which they testified to as being at different places on the premises. Had these twenty-three men professed to have visited this distillery for the purpose of making an examination, and while there, with the property before them, counted the tiers of barrels, and then and there estimated the quantity on the premises at two thousand five hundred barrels, and twelve others, equally intelligent and capable of observation, had sworn that they, too, went there for a like purpose, and, after diligent search, could find only some twenty-five in all, some of them working in the rooms, others storing property in them, and still others removing floors

62 from the very apartments where these conflicting oaths located the greatest amounts of whisky, then there would be no room for reconciliation or charity. The conflict would be too gross to call it misapprehension. Perjury beyond all doubt would have been committed. But you have no such case before you. Neither party professes to have made an estimate then and there, with the property before them, but each witness relies upon recalling what he had neither duty or interest to observe at the time, and make measurements, and form opinions as to the quantities only from what he remembers of the past. There is much liability for mistake on both sides in all such instances. Had this case been less important, and the expense and trouble of its retrial less, I am not at all certain but that I should have excluded this testimony altogether, trusting that a higher court would have upheld my decision in reference to what I concede would be a new step in practice. And now, gentlemen, in view of this state of facts, what should be your application of the rule of law that doubts should be resolved against the defendants? You certainly, it would seem to me, will be unable to fix with entire confidence upon any specific amount of whisky on hand in October, 1865. It certainly presents a case where you cannot say but there is doubt. It is a doubt in the power of the defendant to remove. If he does not do so, the law pronounces what your duty is. (Here the court called for the mark-book kept by the defendants.) There is a matter which at one time I had though' I was at liberty to omit, but subsequent reflection has convinced me that it is my duty to call your attention to it. If you believe that there have been any additions made, by or with the concurrence of the defendants, to this book for the purpose of creating proof

contrary to the truth, it also, perhaps, in an equal degree with any other facts in the case, raises a strong presumption against them.

63 Here is an entry at the foot of the page, "Stopped this day; 2,056 barrels on hand in cribs and building." That is wholly exceptional. There is no other entry in the book like it. Its whole theory seems to be at war with the entry. You will observe the first one, which says 227 barrels on hand, is but a few months before, in December, 1863. Why, "in cellar" should be added to several of these entries, when at this very period it is claimed there were several thousand barrels in the other departments, is not shown. By looking back in the book you will find blanks left all the way through, where these entries in red ink might have been made for any distance back. It is just in this period that the exceptional entry is made, and nowhere else; and to that I deem it my duty particularly to call your attention.

Gentlemen, a long experience of thirty-odd years at the bar, in the contests of which I have always entered with very considerable zeal, must necessarily have fixed upon me a habit of earnestness, and, in some degree, unfitted me for concealing those proclivities which it is impossible for any intelligent judge not to have when he tries a case. In going over the facts in this compendious way, simply for the purpose of applying the abstract principles of law, which it is my sworn duty to state to you, I may, unconsciously, and I doubt not I have, more or less, indicated which way, were I a juror, I would find. But that is your province. If, in my zeal, I have unconsciously bowed a little too far over the fence which separates the field of your labors from mine, it is no disrespect for you to bow back again, in the full consciousness that its cultivation is alone for you. That it is so I concede most fully, and do not ask the slightest consideration, on your part, for anything I may have said which intimates what your duty, in that regard, should be, but to the principles of law and the presumptions which it makes

64 from ascertained facts and conceded conditions—these you will take from the court, and inexorably apply as they have been given you in charge.

Upon the conclusion of the charge, the court asked if there were any exceptions to it. Whereupon it was agreed between the counsel for the Government and the defendants that all portions of the charge should be deemed excepted to severally by the defendants, and that the bill of exceptions should be made up in the same form as if the said exceptions were then made in open court and noted by the judge. All of the following exceptions coming within said agreement, and are inserted as part of this bill of exceptions accordingly.

The defendants then & there separately excepted to each of the following portions of said charge, viz:

1st. To the part of said charge in the following words:

1. "The issues before you are very much simplified by the mutual admission that the time within which this wrong has been committed is between October, 1865, & September, 1866, a period of about ten months."

2. Also, 2d, to the part of said charge in the following words, viz:

"It is claimed that the evidence of these consignees, & especially the testimony of the way-bills, is very delusive; that it tends to duplication, & that you will be very likely to charge these defendants twice over with the same amount. So far as the nature of this testimony is concerned, there has been, in modern times, a very great change of opinion, & I do not know that if I should search all the books I ever

read, or call to mind all my experience at the bar, I could select a more fitting instance to illustrate my own opinion of the respective values of these two classes of testimony, than the contrast between the
65 persuasive effect of memoranda, made in the ordinary course of business by those who have no motive to falsify, whose duty it was to record them at the time the transaction took place, on the one hand, & on the other, the grossly-conflicting verbal testimony given in this cause as to the amount of whisky on hand in October, 1865. Compare the two, & see upon which, in its own nature, as men of common sense, you can repose your credence with most confidence. The one is plain, simple, & direct—without a motive of falsification. The other presents a spectacle like this: A phalanx of twenty men swearing, on their oaths, to some two thousand barrels of whisky, at a given time, in a given place, & two-thirds as many—equally intelligent & equally respectable, with equal opportunities of knowledge—swearing there is not fifty barrels there. It is a hapless conflict, leaving the mind in uncertainty, with nothing whatever to rest upon."

3. Also, 3d, to the part of said charge in the following words, viz:

"The only liability to error is the danger of duplication. The waybills, the railroad shipments, the canal-books, are attacked—not so much on account of what they say as the danger that they may speak twice upon the same subject. But it would seem to me that such a mistake is wholly unnecessary. The date, the quantities shipped, the shipments themselves, the consignees' names, all unite in preventing confusion. After much reflection, I am unable to call to mind any direction whatever which it is my duty to give you in estimating this testimony. I am asked for none whatever on the part of the defendants. It seems plain & direct. The utmost which counsel have said of it is, that it lacks that demonstrative certainty—that it is not that full proof
66 which the law demands in an action so highly penal as this. Gentlemen, this may be most fully conceded, & still the Government be entitled to your verdict."

4. Also, 4th, to the part of said charge in the following words, viz:

"The proof in the outset may be defective; it may not be sufficient to enable you, without any doubt or hesitation, to find against the defendants, & still it may be your duty, nevertheless, so to find; for although I instruct you that the case must be made out beyond all reasonable doubt in this, as well as in criminal cases, yet the course of the defendants may have supplied, in the presumptions of law, all which this stringent rule demands. In determining, therefore, in the outset whether a case is established by the Government, you will dismiss from your minds the perplexing question, whether it is so made out beyond all doubt. It needs not, in the exigencies of this case, be so proved in order to throw the burden of explanation upon the defendant, if from the facts you believe he has within his reach that power. In the end all reasonable doubt must be removed; but here, at this stage, you need say only, is the case so far established as to call for explanation? Then the defendant assumes the burden of proof."

5. Also, 5th, to the part of said charge in the following words, viz:

"If, then, you conclude that, unexplained & uncontroverted by any testimony, the opening proof would enable you to find against the defendants for the claim of the Government, or any material part of it, you will then take up their testimony in view of the principle
67 which has been so much discussed, & which the court announced at an earlier part of the trial. Although the counsel for the defense, when this principle was announced, with spirit & energy, begged

leave to differ with the court in reference to the effect of not producing the books, & not swearing the defendant, still the presumption of law is that client & counsel have deliberately, & with full knowledge of the law & all its presumptions, elected to withhold this proof, & you will not in the smallest degree abate the full application of the principle on any notion that it may have been misapprehended. The rule is one which I am confident will commend itself to your common reason. It is this: Without exception, where a party has proof in his power which, if produced, would render certain material facts, the law presumes against a party who omits it, & authorizes a jury to resolve all doubts adversely to his defense. The same rule is applicable in a case where a party once had proof in his power which has been voluntarily destroyed or placed beyond his reach."

6. Also, 6th, to the part of said charge in the following words, viz:

"4 Howard, Sup. Ct. Report, page 242, in a revenue case, & in reference to circumstances much like these this jury has to consider, it is said: 'Under these circumstances the claimant was called upon by the strongest consideration—personal & legal argument—to bring to his defense the best evidence under his control.' They add, (p. 248:) 'Practical illustrations of this rule are witnessed daily in criminal cases, & are to' familiar to require more particular reference.'"

68 7. Also, 7th, to the part of said charge in the following words, viz:

"As Judge Blatchford applies this principle to a defendant who, in a case strikingly like this one, refused to contradict, under oath, a witness who swore to his confessions, I will, in connection with what he says, although somewhat out of the order I am following, ask your attention to what one of the Government witnesses testified in reference to the defendant's admissions. He said the defendant told him, at the distillery, that he had little or no whisky there, some time in 1865. He testifies that in open court. The defendant sat by & heard it, but made no denial. It is not a matter for the jury to say that they will indulge in vague surmises in reference to the possibility of the witness being mistaken. The law, acting upon well-settled principles of common reason, says that when such testimony is given & the defendant is by & makes no denial, all doubts are resolved against him.

"Mr. FOLLETT. I would wish to state to your honor right there that this testimony was given in rebuttal, if your honor will recollect.

"COURT. That makes no difference whatever. That testimony could not have been put in chief, because it was not then applicable to the exigencies of the case. It was put in rebuttal, as the learned counsel well suggests, and to rebut what? They had introduced some twenty-three witnesses, who testified vaguely & loosely to estimates of whisky on hand, referring to anterior periods, endeavoring to recollect the observations which they then made; & to rebut that the Government called a witness, who said, 'I conversed with the defendant at the distillery, & he told me he had little or no whisky there.' Whether it is put in rebuttal or in chief has no significancy whatever in

69 reference to the application of this principle of presumption," because the defendants had full liberty to reply to it by counter proof if they pleased.

8. Also, 8th, to the part of said charge in the following words, viz:

"It is for you to say whether the defendant did or did not keep books of account. The testimony, however, upon this point seems to be uncontradicted, & that they consisted of day-books, journals, & ledgers. You will act upon your own business knowledge of what in

all probability those books contained. The presumption of law, I charge you, is that the defendant did keep the accounts usual & necessary for the correct understanding of so large a business, & the accurate accounting, from time to time, between the several partners interested in it."

9. Also, 9th, to the part of said charge in the following words, viz:

"I say to you that the books of the firm of which H. D. Chaffee was a member, he being dead, belonged of right & are assumed to be in possession of the surviving partners."

10. Also, 10th, to the part of said charge in the following words, viz:

"The law presumes, also, the books to be in existence & accessible to the defendant S. L. Chaffee and his co-defendants, unless the contrary is shown by the evidence. The declaration of counsel that they are in Buffalo is not evidence of that fact, &, if it were, would in law constitute no excuse for their non-production, without further proof that upon diligent inquiry & effort they could not be produced."

70 11. Also, 11th, to the part of said charge in the following words, viz:

"If you believe the books were kept which contained the facts necessary to show the real amount of whisky in the hands of the defendants, in October, 1865, & the amount which they had sold during the next ten months, or that the defendants, or that either of them, could, by their own oath, resolve all doubts on this point—if you believe this, then the circumstances of this case seem to come fully within this most necessary & beneficent rule."

12. Also, 12th, to the part of said charge in the following words, viz:

"And now, in the light of this rule, let us proceed briefly to consider the defendant's case. And, first, I repeat, for the purpose of explanation only, that it is claimed, on the part of the defendant, the evidence of the Government is uncertain, & may lead to duplication. Although you are to resolve all doubts against the defendant, this does not mean that, because the plaintiff makes a prima-facie case for $750,000, you are to write that down inexorably & stop there. It means only that, if you believe such case is made, you are to start with that, & then carefully consider all the testimony, &, so far as you can, from any source, without any doubt or hesitation, mark out any or all of it, that you will so do. When there is certainty, this rule has no application. It is only where it is vague & doubtful that it comes in to relieve you from the doubt & perplexity which the silence of the defendant occasions."

13. Also, 13th, to the part of said charge in the following words, viz:

71 "Let us proceed, then, with the defendants' case. They say, grant what the Government asserts—that we sold eight or nine thousand barrels of whisky during this time; we show you we paid tax on six thousand barrels, & that we had two thousand or three thousand on hand. How is this proved? Two intelligent parties, whom you are warranted in presuming must know with certainty this great leading fact, refuse to testify. The law accords to them liberty to speak, & yet they remain silent. The books are also withheld. As a substitute for these sources of certainty there are produced, as witnesses, some neighbors of the defendants, grocers, physicians, day-laborers, & farmers, who visited this distillery socially or on business. All these witnesses speak—& to this I ask your particular attention—of subsequent estimates made from recollection by endeavoring to call to mind quantities which they saw at past periods. They differed greatly in their

general aggregate, & still more so in the amounts which they testified to as being at different places on the premises. Had these twenty-three men professed to have visited this distillery for the purpose of making an examination, & while there, with the property before them, counted the tiers of barrels, & then & there estimated the quantity on the premises at two thousand five hundred barrels, and twelve others, equally intelligent & capable of observation, had sworn that they, too, went there for a like purpose, &, after diligent search, could find only some twenty-five in all—some of them working in the rooms, others storing property in them, & still others removing floors from the very apartments where these conflicting oaths located the greatest amounts of whisky—then there would be no room for reconciliation or charity. The conflict would be too gross to call it misapprehension. Perjury, beyond all doubt, would have been committed. But you have no such case before you. Neither party professes to have made an esti-
72 mate then & there, with the property before them; but each witness relies upon recalling what he had neither duty or interest to observe at the time, & make measurements & form opinions as to the quantities only from what he remembers of the past. There is much liability for mistake on both sides in all such instances. Had this case been less important, & the expense & trouble of its retrial less, I am not at all certain but that I should have excluded this testimony altogether, trusting that a higher court would have upheld my decision in reference to what I concede would be a new step in practice.

"And now, gentlemen, in this state of facts, what should be your application of the rule of law that doubts should be resolved against the defendants? You certainly, it would seem to me, will be unable to fix, with entire confidence, upon any specific amount of whisky on hand in October, 1865. It certainly presents a case where you cannot say but there is doubt. It is a doubt in the power of the defendant to remove. If he does not do so, the law pronounces what your duty is."

14. Also, 14th, to the part of said charge in the following words, viz:

"If you believe that there have been any additions made by or with the concurrence of the defendants, to this book for the purpose of creating proof contrary to the truth, it also, perhaps, in an equal degree with any other facts in the case, raises a strong presumption against them. Here is an entry at the foot of the page: 'Stopped this day; 2,056 barrels on hand in cribs & building.' That is no other entry in the book like it. Its whole theory seems to be at war with the entry. You will observe the first one, which says 227 barrels on
73 hand, is but a few months before, in December, 1863. Why 'in cellar' should be added to several of these entries when at this very period it is claimed there were several thousand barrels in the other departments, is not shown. By looking back in the book you will find blanks left all the way through, where these entries in red ink might have been made for any distance back. It is just in this period that the exceptional entry is made, and nowhere else, and to that I deem it my duty particularly to call your attention."

15. And the defendants then and there excepted, 15th, to so much of said charge as directed the jury that all doubts which might have been removed by the production of defendants' books should be resolved against the defendants.

16. And the defendants then and there excepted, 16th, to so much of said charge as directed the jury that all doubts should be resolved against the defendants which might have been removed by their testimony in the case.

17. And the defendants also then and there excepted, 17, to so much of said charge as instructed the jury as a presumption of law that all doubts were to be resolved against the defendants which might be removed by their testifying or producing their books.

18. And the defendants also then and there excepted, 18, to so much of said charge as instructed the jury that, although it was necessary in the end for the Government to prove its case beyond a reasonable doubt, such doubt might be removed by circumstances showing that the defendants had in their power to produce proof which would render certain that which was otherwise uncertain in the case, and omitted to do so.

74 19. And the defendants then and there excepted, 19, to so much of said charge as instructed the jury that "without exception, when a party has proof in his power which if produced would render certain material facts, the law presumes against a party who omits it, and authorizes a jury to resolve all doubts adversely to his defense."

And the defendants thereupon presented this their bill of exceptions, and asked the court to sign, seal, and allow the same, and order the same to be made a part of the record of this cause, which is accordingly done.

H. H. EMMONS, *Judge.* [SEAL.]

Exhibit "A" to bill of exceptions.

EXHIBIT A.

Abstract of clearances by T. Brown, Dayton office, of whisky shipped from Tippecanoe to Dayton & Cincinnati.

1865.		Issued at—	Boat.	Masters.	Barrels.	To—
Dec. 2.	No. 893	Piqua	A. Hopkins	French	50 H. wines	Cin'ti.
6.	" 3	do	Adolph Wood	Linn	30 H. wines	do.
31.	" 32	do	do.	Linn	57 whisky	do.
1866.						
March 21.		Dayton permit	State bank	Cottsell	156 do.	Dayton.
28.		do. do	do. do	Sullivan	110 do.	do.
Ap'l 6.		do. do	do. do	Sullivan	110 do.	do.
May 12.	234	Piqua	Senator	Smith	50 do.	Cin'ti.
" 22.		Dayton permit	Youmans	Oaks	210 do.	Dayton.
" 28.	280	Piqua	Marion	Brownell	40 do.	Cin'ti.
" 30.		Dayton permit	Youmans	Oaks	200 do.	Dayton.
" 31.	275	Dayton	Belle	Shafor	24 H. wines	Cin'ti.
" 31.	303	Toledo	J. A. Wilson	Kennedy	17 do. do.	do.
June 12.		Dayton permit	Youmans	Oaks	150 whisky	Dayton.
23.		do. do	State Bank	Cottsell	180 H. wines	do.
75						
23.	352	Dayton	Pittsburgh	Brook	70 whisky	Cin'ti.
July 3.		Dayton permit	Youmans	Oaks	200 do.	Dayton.
Aug. 18.	521	Dayton	do.	do.	100 do.	Cin'ti.
" 30.	561	do.	do.	do.	140 do.	do.
" 30.	"	do.	do.	do.	100 do.	Dayton.
Sept. 10.		Dayton permit	Talisman	Gillespie	210 do.	do.
					2,194	

Exhibit "B" to bill of exceptions.

EXHIBIT B.

A statement of whisky cleared at the Piqua office.

Date.	No. clear'.	Issued at—	Boat's name.	Master's name.	No. bbls.	Where from.	Where to.	No. miles.
1865.								
Nov. 11	1,904	Cin'ti	Gentle Annie	Warrende	200	Way.....	Toledo	166
1866.								
Mar. 14	Pass.	Piqua.....	State Bank..	Cotral.....	304	Tippecanoe .	Piqua	14
Ap'l 3	do.	do.	do. do.....	Sullivan.....	110	do. ..	do.	"
April 30	191	Dayton ...	Marion.....	Bromwell	165	do. ..	do.	"
" 30	167	Cin'ti	Johney Daniel	Tonney	58	do. ..	do.	"
May 9	211	Dayton....	J. R. Youmans	D. Oaks	180	do. ..	do.	"
" 18	963	Cin'ti.....	Contract	H. Myers.....	26	do. ..	do.	"
June 6	288	do.	A. Wood	Linn	12	do. ..	Toledo	180
July 26	1,768	do.	Brilliant.....	Tiol	20	do. ..	Piqua	14
Aug. 14	334	Middletown	Hope	Woodbury	20	do. ..	do.	"
" 30	2,133	Cin'ti.....	G. Miller....	Miller	15	do. ..	do.	"
Sept. 6	Pass.	Piqua	Talisman....	Gillespie	21	do. ..	do.	"
" 12	593	Dayton....	Florien	Burkheard	10	do. ..	St. Mary's.	39
					1,141			

I hereby certify the above to be a true abstract from my books and clearances of the canal-books at Piqua.

Cin., Nov. 19, '67.

(Signed) JAMES CARSON, *Coll.*

76 *Exhibit C to bill of exceptions.*

EXHIBIT C —*Memorole.*

Date.	No. clear'.	Where issued.	Where toll p'd.	No. bbls.	Where from.	Where to.	Name of boat.
1865.							
Dec. 4	897	Piqua.....	Dayton ...	50 H. W....	Way 80 miles..	Cin'ti	Cashier.
" 5	893	do.	do.	50 H. W...	Tippecanoe ...	do.	A. Hopkins.
" 11	3	do.	do.	30 " "	do.	do.	R. Wood.
1866.							
Jan. 2	32	do.	do.	57 whisky.	do.	do.	do.
April 16	106	do.	do.	79 H. W ...	do.	do.	Senator.
May 14	234	do.	do.	50 whisky.	do.	do.	do.
" 29	280	do.	do.	40 "	80 miles	do.	Marion.
June 1	275	Dayton ...	do.	24 blank...	Tippecanoe ...	do.	Belle.
" 2	303	Toledo....	do.	17 whisky.	do.	do.	J. A. Wilson.
" 25	352	Dayton ...	do.	70 "	do.	do.	Pittsburgh.
July 21	424	do.	do.	150 "	80 miles.....	do.	Marie Louise.
Aug. 10	481	do.	do.	150 "	Tippecanoe ...	"	J. R. Youmans.
" "	481	do.	do.	150 "	do.	Dayton ...	do.
Aug. 20	521	do.	do.	100 "	do.	Cin'ti	do.
Sept. 3	561	do.	do.	100 "	do.	do.	do.
" 3	561	do.	do.	100 "	do.	Dayton ...	do.
				1,117 bbls.			

Exhibit "D" to bill of exceptions.

EXHIBIT "D."

THE UNITED STATES } 747. U. S. cir. court.
vs.
H. D. CHAFFEE & CO. }

The defendants will take notice that the plaintiffs have filed a motion, and have thereby moved the court, that the defendants be required to produce on the 8th of March, 1870, the day set for trial of this case, the following books, papers, and documents now in their possession and under their control, which certain evidence pertinent to the issue
77 herein, to wit, all books, papers, and statements required by law to be kept or made by defendants as distillers at Tippecanoe, Ohio, from July 1st, 1864, to Oct. 1, 1866, and all other books, papers, statements, and memoranda kept by them, pertaining to their business during the same period at Tippecanoe.

WARNER M. BATEMAN, *U. S. Att'y.*

CINCINNATI, *March 3d*, 1870.

Upon which said exhibit is endorsed the words and figures following, to wit:

CINCINNATI, *March 3d*, 1870.

Rec'd this writ at 2 p. m., March 3, 1870, and served H. L. Burnett, of the firm of Burnett & Follett, personally by copy of the within, this day at 2.40 p. m.

H. HICKENLOOPER, *Marshal.*
By T. H. MARPE, *Deputy.*

And afterwards, to wit, on the 27th day of January, in the year of our Lord one thousand eight hundred and seventy-two, an entry was made upon the journal of said court in said case, in the words and figures following, to wit:

Entry.

THE UNITED STATES } 747. Debt.
vs.
SIDNEY L. CHAFFEE ET AL. }

This day this case came on to be heard upon the motions of defendants in arrest of judgment and for a new trial, and were argued by counsel and submitted, and the court on consideration thereof do overrule said motions; to which ruling def'd'ts except.

78 THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

I, Thomas Ambrose, clerk of the circuit court of the United States, within and for said district, hereby certify the foregoing transcript to be truly taken and copied from the files and record of said court as the same remain in this office.

In testimony whereof I have hereunto set my hand and affixed the

seal of said court at Cincinnati, this 8th day of July, A. D. 1872, and of the Independence of the United States of America the 97th.

Attest:

[SEAL.] THOMAS AMBROSE,
Clerk Cir. C't U. S., S. D. Ohio.

79 Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States, within and for the southern district of Ohio, greeting:

Because in the record and proceedings, and also in the renditiou of a udgment, in a plea which is in the said circuit court before you, between The United States of America, plaintiff, and Sidney L. Chaffee and Rue P. Hutchins, defendants, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: You are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, on the first Monday in the month of December next, in the said Supreme Court, then and there to be held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this eighth day of July, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States of America the 97th.

Attest:

[SEAL.] THOMAS AMBROSE, *Clerk.*

80 THE UNITED STATES OF AMERICA:

Supreme Court of the United States to the United States of America, greeting:

Whereas Sidney L. Chaffee and Rue P. Hutchins have obtained the allowance of our writ of error to the circuit court of the United States within and for the southern district of Ohio, directed to remove into the said Supreme Court, to be holden at the city of Washington, on the first Monday in the month of December next, the record of a certain plaint, process, preceedings, and judgment in an action of debt wherein you, the said, The United States of America in that action lately recovered against the said Sidney L. Chaffee and Rue P. Hutchins a judgment for two hundred and thirty-five thousand six hundred and eighty dollars, debt and costs, as by the said record in the said circuit court remaining appears, in which said record and proceedings, and also in the rendition of the judgment thereupon, manifest error hath intervened, as by the said Sidney L. Chaffee and Rue P. Hutchins we are informed, and our said writ of error granted, issued, and allowed as aforesaid, for the purpose of correcting the errors aforesaid alleged, if any there be: You are, therefore, hereby commanded and cited to be and

appear before the judges of the said Supreme Court, at the city of Washington, at the next term of said court, to be holden on the first Monday in the month of December next, to have the errors aforesaid
81 corrected, and the judgment of our said Supreme Court thereupon.

Witness the Honorable Salmon P. Chase, Chief Justice of the United States of America, this 8th day of July, in the year of our Lord one thousand eight hundred and seventy-two and of the Independence of the United States of America the 97th.

[SEAL.]

PHILIP B. SWING,
One of the Judges of the Circuit Court of the United States for the South'n Dist. Ohio.

I hereby acknowledge service of the foregoing citation on behalf of the said United States of America, the defendant in error.

Cincinnati, July 8th, 1872.

WARNER M. BATEMAN,
Att'y for defendant in error.

(Indorsement on cover:) No. 408. Sidney L. Chaffee & Rue P. Hutchins, plaintiff, in error, vs. The United States. S. Ohio C. C. U. S. Filed 26th August, 1872.

Robert Clarke & Co., Prs., 65 West Fourth St., Cin., O. [*Dec.* 1873.

Supreme Court of the United States.

Sidney L. Chaffee and Rue P. Hutchins,
Plaintiffs in Error,

vs.

The United States of America,
Defendant in Error.

Error to the Circuit Court for the Southern District of Ohio.

Brief for Plaintiffs in Error.

by

HOADLY & JOHNSON,
COX & FOLLETT,

Robert Clarke & Co., Prs., 65 West Fourth St., Cin., O. [*Dec.* 1873.

Supreme Court of the United States.

Sidney L. Chaffee and Rue P. Hutchins,
Plaintiffs in Error,

vs.

The United States of America,
Defendant in Error.

Error to the Circuit Court for the Southern District of Ohio.

Brief for Plaintiffs in Error.

by

HOADLY & JOHNSON,
COX & FOLLETT,

STATEMENT OF THE CASE.

This is a writ of error prosecuted to reverse a judgment rendered at the February term, 1870 (Record, 19), in favor of the United States of America, plaintiff below, and against Sidney L. Chaffee and Rue P. Hutchins, defendants below, for the recovery of $235,680 debt, and one cent damages, together with costs, which debt, by verdict (Ib. 18), after trial before Judge H. H. Emmons and a jury, at the same term, it had been found that they "doth owe" the plaintiff.

The action was debt, originally brought against Highland D. Chaffee, Sidney L. Chaffee, William M. Chaffee, and Rue P. Hutchins, partners as H. D. Chaffee & Co., and, as appears by the indorsement on the writ (Ib. 1), "to recover $192,000, being penalty due plaintiffs from defendants for the non-payment of the tax on 48,000 gallons of whisky, as required by the internal revenue laws of the United States, said whisky being manufactured by said defendants during the years 1863, 1864, and 1865, and during the year 1866, prior to September 1, 1866, at their distillery at Tippecanoe, Miami county, Ohio." Summons was served upon all the defendants. (Ib. 2).

The declaration contained three counts, the third of which alleged, that between February 1, 1865, and September 1, 1866, the defendants, unlawfully, knowingly, and fraudulently, had in their custody and possession, and under their control, 24,900 gallons of distilled spirits, for the purpose of selling the same with the design of avoiding the payment of the duties imposed by law thereon, whereby they forfeited and became liable to pay to the plaintiffs the sum of $99,600, double the amount of the taxes imposed by law upon said distilled spirits.

Issue was joined; the cause tried to Judge Leavitt and a jury; verdict for the United States in $253,132 debt, and one cent damages (Ib. 7); motion for new trial made, argued, and sustained, March 6, 1868 (Ib. 8).

Thereupon the District Attorney took leave to file,

and did file an amended declaration in debt, containing three counts (Ib. 8).

As the first and second counts were afterwards abandoned by the government (Ib. 17), we need only refer to the third count (Ib. 11), being that upon which issue was joined and judgment rendered.

This count charges that the "*defendants*," from February 1, 1865, to September 1, 1866, were citizens and residents at Tippecanoe, Miami county, in the fourth collection district of internal revenue of Ohio, and that as such citizens and residents, they, *the defendants*, then and there did "carry on and transact the business of distillers of spirits *under said firm name of H. D. Chaffee & Co.*, for which they were duly licensed by the proper United States authorities, thereto duly empowered by law," and were thereby bound to pay all the revenue and taxes imposed upon them, their business, and property, and to comply with the act passed June 30, 1864, to provide internal revenue, and the acts amendatory thereto, in reference to their said business and the distilled spirits by them manufactured and distilled; nevertheless, that *the defendants*, to evade the payment of their just and lawful taxes, and said acts of Congress, and to cheat the plaintiff, and with intent to evade the payment of the lawful duties upon 200,000 gallons of distilled spirits, "*by them distilled at their distillery*," did, between said dates, "unlawfully, knowingly, and fraudulently, have in their custody and possession, and under their control, 200,000 gallons of distilled

spirits" (each gallon subject to a tax of two dollars imposed by law, which is unpaid), "for the purpose of selling the same, with the design of avoiding the payment of the duties imposed by law thereon," and "*the defendants*" did then and there unlawfully and fraudulently sell, dispose, and remove the same, so that the lien of the plaintiff has been lost, and the taxes remain unpaid; "which act of having in their custody and possession, and under their control, said distilled spirits, for the purpose of selling the same, with the design of avoiding the payment of the duties imposed by law thereon in fraud of the internal revenue laws of the United States, by *said defendants*, was contrary to the form of the statute in such case made and provided, whereby the *defendants* forfeited and became liable to pay to the plaintiffs, for the offense aforesaid, the penalty of eight hundred thousand dollars, double the amount of the taxes imposed by law upon said distilled spirits;" and the declaration concludes that "an action hath accrued to the plaintiffs to demand and have of the *defendants* the sum of one million and ten thousand dollars, together with costs in that behalf expended."

To this declaration the defendants demurred generally (Ib. 12), but their demurrer was overruled (Ib. 13), and the defendants, Sidney L. Chaffee and Hutchins then pleaded (Ib. 14) *not guilty* and *nil debet*, and the defendant, William M. Chaffee, pleaded separately (Ib. 15) that he was not a member of the firm of H. D. Chaffee & Co., or interested in its business; and

the District Attorney filed the common *similiter* to the pleas of Sidney L. Chaffee and Hutchins (Ib. 17), and traversed by replication the plea of William M. Chaffee (Ib. 15).

The death of Highland D. Chaffee was then suggested, and it was ordered, that as to him, "all proceedings be stayed and abate" (Ib. 16); and on March 9, 1870, a jury was empanelled and sworn to try the issues, and the cause progressed until March 18th, when an entry was made, from which we copy as follows:

"And now came the plaintiffs, by their counsel, and in open court confess that they will not further prosecute said William M. Chaffee, on either count of the declaration, or on the issues above joined between plaintiffs and said William M. Chaffee; it is therefore ordered that said William M. Chaffee be thereof acquit and go hence without day."

On March 25, 1870 (Ib. 18), the verdict was rendered that

"*The defendant*s doth *owe* to the plaintiffs the sum of $235,680, in manner and form as the said plaintiffs hath complained against them, and they assess the damages of the plaintiffs by reason of obtaining the same at one cent."

Motions were made by the defendants for new trial and in arrest of judgment, but without waiting for their hearing, the Court entered judgment April 1, 1870, and continued the motions (Ib. 19), and extended the time for the preparation of a bill of exceptions (Ib.

18), which was afterwards duly signed, sealed, and spread upon the record, as appears on pages 20, *et seq.*

The motions were argued and taken under advisement June 7, 1870, but were not disposed of until January 27, 1872, when they were overruled. (Ib. 43.)

During the trial numerous exceptions were taken to rulings of the Court in the admission of testimony offered for the government. After the Court had charged the jury, it was "agreed between the counsel for the government and the defendants that all portions of the charge should be deemed excepted to severally by the defendants, and that the bill of exceptions should be made up in the same form as if the said exceptions were then made in open court and noted by the judge," (Ib. 36); and nineteen exceptions coming within said agreement are inserted as part of the bill of exceptions.

The errors, which we claim the Court committed, are many, but the questions involved divide themselves into three classes, arising (1) upon the overruling of the demurrer and motion in arrest of judgment; (2) at the trial, in the admission of incompetent testimony offered by the government; and (3) presented by exceptions to the charge of the Court.

The action was prosecuted, and the recovery will be attempted to be sustained, under the 48th section of the act of June 30, 1864, to provide internal revenue (13 Stat. at Large, 240); and the demurrer and motion in arrest of judgment present the question whether the penalty imposed by that section is intended to apply to

others than those *found* in possession of dutiable articles for the purpose of selling the same with intent to avoid payment of the duty. The motion in arrest of judgment also raises the question whether there can be a recovery in cases of this kind except against all who are joined as defendants, and whether, therefore, the discharge of William M. Chaffee did not entitle all the defendants to the same relief.

The defendants, H. D. Chaffee & Co., were distillers at Tippecanoe, Miami county, Ohio. The Miami canal extends from Cincinnati to Toledo, passing through Tippecanoe, the nearest collector's offices being at Piqua on the north and Dayton on the south. Between these points were four distilleries, viz: Smith's, seven miles north of Dayton; Chaffee's, at Tippecanoe, fifteen miles north of Dayton; Culbertson's, between Tippecanoe and Piqua; and Farrington & Slausson's, three miles south of Piqua.

The Miami canal is owned by the State of Ohio, but was leased in 1861 to private parties for the term of ten years, and the lease was extended by joint resolution of the general assembly of Ohio, passed April 11, 1867 (Swan & Sayler's Supplement, 67, note), for a further term of ten years.

It was in proof that during the time embraced in the controversy, viz., between February 1, 1865, and September 1, 1866, the defendants paid taxes in full on 6,045 barrels of whisky, manufactured by them during said time, viz., $622,781. (Record, 28.)

It was also proved that there were received and sold by various consignees for the defendants, during the same time, 5,529 barrels of whisky. (Ib. 27.)

In order to show that the defendants had in their custody or possession dutiable whisky "for the purpose of selling the same with the design of avoiding payment of the duties imposed thereon," the government attempted to prove the movement of more whisky, belonging to the defendants, by rail or by canal from Tippecanoe, between the dates aforesaid, than the quantity on which taxes were paid, in addition to that on hand at the commencement of the period.

This was done in part by the introduction of testimony, to which objections were presented by the defendants, overruled by the Court, and exceptions taken by the defendants.

The canal collectors at Piqua and Dayton were examined. They had no personal knowledge of any facts bearing upon the controversy; but they produced books known as certificate-books, containing printed forms, with blanks to be filled in case of the clearance of canal-boats.

These certificates were in the following form (Ib. 21):

No. 1. Specimen of blank certificate.

No. .] COLLECTOR'S OFFICE,
DAYTON, , 186 .

I, , master of the boat , do certify that the following is a full and true statement of all the cargo taken on board said boat for transportation on her present passage, and that I have paid toll thereon as follows, to wit, to , for original cargo on clearance No. , viz:

No. 2. Specimen of the certificate filled up.

No. .] COLLECTOR'S OFFICE,
DAYTON, *December* 2, 1865.

I, French, master of the boat A. Hopkins, do certify that the following is a full and true statement of all the cargo taken on board said boat for transportation on her present passage, and that I have paid toll thereon as follows, to wit, to Piqua, for original cargo on clearance No. 893, viz:

The Boat.	From.	To.		Miles.	Tolls.
	Troy.....	Cincinnati	.....	104	2 06
900 bush. barley.....	"	"	43,200	"	21 60
	To Dayton.....				
50 bbls. H. wines.....	Tipp.....	Cincinnati.....	18,000	.....	7 20
1,645.29 bush. oats.....	Troy.....	"	51,314	86	18 68
					25 88

H. U. FRENCH.

The collectors had no knowledge of the truth of these entries. Brown, the Dayton collector, says

(Ib. 20): "As to the source from which I derive my information to make entries, the captains of the boats report when they come into the office for the clearances, and the collector is presumed to know them, and generally does. Sometimes a new man comes on a boat; we simply require the name of the boat, and where she is going to; and if the boat is freighted we ask for the freight-bills, and if he has them these entries are made from them; and sometimes a man calls and say sthat he has left his bills of lading on the boat, and we take his statement, and if we do not know him well, we say to him to bring his bills in, and sometimes the boat is cleared in the absence of a bill, but not unless we know the man who presents himself at the office." Two of the entries in the Dayton book were made by Stevenson (grandson of collector Brown), who testifies (Ib. 25) that he got the facts from the canal-boat captains, and did not go to look at the freight, and only knew where it came from by information from the captains. Carson, the Piqua collector, testified (Ib. 23) that "he had no personal knowledge of the truth of the statements in the certificates; . . . that he got all the entries from the bills of lading. That he did not like to take the captain's word, though he had sometimes done it."

The government examined none of the persons whose names were signed to the certificates produced by Brown and Carson, as to the genuineness of such signatures, nor was proof given of the death or of the

handwriting of any of them. Some, but not all, of said captains were examined as witnesses, and testified to the carriage of whisky from Chaffee's distillery on their boats at dates corresponding and of quantities to the amount of the several certificates signed by them. (Ib. 28.)

In this state of case the government claimed the right, and the Court permitted the certificate-books and each of the certificates produced by Brown and Carson to be introduced, and given in evidence to the jury, "as competent to show that a given quantity of whisky passed a certain point on a given day," notwithstanding the objection that the same were hearsay and *res inter alios acta*, and the exception of the defendants (Ib. 23), and afterwards overruled a motion made by the defendants to exclude from the jury each of these certificates, and each certificate produced by the Cincinnati collector, and each railroad way-bill hereafter referred to, and refused to exclude any one of said certificates and any one of the parcels in the railroad way-bills, and the defendants excepted.

Messerole, the Cincinnati collector, was also examined, and produced a similar certificate-book, containing blanks filled up by him, which was also admitted in evidence, notwithstanding a like objection and exception of the defendants. (Ib. 25.) This book is a record of arrivals, and differs from the Piqua and Dayton books in this, that Piqua and Dayton were clearance ports, and Cincinnati a delivery port for any whisky that might have come from the defendants by canal from

Tippecanoe, and that the Cincinnati certificates are unsigned. The following is a specimen of the entries in this Cincinnati book (Ib. 24):

No. .] COLLECTOR'S OFFICE,
CINCINNATI, *July* 21, 1866.

I, , master of the boat Marie Louisa, do certify that the following is a full and true statement of all the cargo taken on board said boat for transportation on her present passage, and that I have paid toll thereon as follows, to wit, to Dayton for original cargo on clearance No. 424, viz:

The boat.	From.	To.		Miles.	Tolls.
	Way to way.	Cin....	.....	95	2 38
150 bbls. H. wines.....	" 52,500	"			
100 " flou	" 21,600	"			
			74,100	80	29 64
725 bus. s. corn.....	"	"	40,500	80	13 83
Ship-stuff	"	"	14,000	80	5 69
					51 45

Tippecanoe is a station upon the Dayton and Michigan Railroad, which connects at Piqua with the Columbus, Chicago and Indiana Central Railroad, and at Dayton with the Cincinnati, Hamilton and Dayton Railroad and a branch of the Little Miami Railroad, and the government offered evidence to prove the shipment of whisky by rail, said evidence consisting of way-bills accompanying said shipments, made in the regular course of business by clerks in the employ of the railroad companies—some of whom were dead and their handwriting was proved, and some were living, and produced. These way-bills were in the following form (Ib. 27):

432.] DAYTON, *June* 25, 1866.

L. M. Pittsburgh, via Steub. & P. Handle.

H. D. CHAFFEE & Co., 106 "A."

J. P. Bankson, 60 bbls. whisky.

Philadelphia, Pa., 21,000, 21		4,410.....	400
Pitts. to Philadelphia,	26½		
	47½		

To the admission of each way-bill, the defendants objected, and their objection having been overruled, excepted. The way-bills showed, in all, the movement of 1,468 barrels of whisky from Tippecanoe, of which 409 barrels went no further than Piqua; also of 1,490 barrels from Piqua, 537 from Dayton, and the receipt of 2 barrels at Dayton, and 1,008 at Cincinnati. (Ib. 27.)

The canal certificates showed 2,194 barrels of whisky cleared at the Dayton office; 1,141 at the Piqua office, and 1,117 received at Cincinnati. The government admitted, however (Ib. 26), that 497 barrels of the whisky cleared at Dayton and 849 barrels of that cleared at Piqua were embraced in the 5,529 barrels proved to have been sold by consignees; also, that all the entries of whisky received at Cincinnati, except three items, of 450 barrels in all, were duplicates of certificates from the Dayton book, "and that the defendants could only be charged with those three items by the testimony of Messerole, and the entries in his books. This admission was prior to the defendant's motion to exclude the certificates from the jury, and these three certificates went to the jury with the others,

and the Court's refusal to exclude the certificates embraced these three with the others.

The specific portions of the charge excepted to are contained in the following assignment of errors, and are numbered from eight to twenty-six inclusive. The entire charge is copied into the bill of exceptions. We are aware that this would, ordinarily, be irregular, but in the present case it was unavoidable. Nearly, if not quite, all of it was the subject of specific exception. Besides, we desire to submit the proposition that the character of this charge was such as to withdraw the case from the jury, and deprive the defendants of their constitutional right of trial by jury. That Judge Emmons had invaded the province of the jury he seems to have been apprehensive. (Ib. 36.) What we claim is, that the entire charge shows that it was not a return to his own sphere, merely to tell the jury that if he had bowed over the fence which divided the line of their labors from his, he bowed back again.

ASSIGNMENT OF ERRORS.

The Court, as we think, erred:

1. In overruling the defendants' demurrer.

2. In overruling the motion in arrest of judgment.

3. In admitting the entries contained in the certificate-book produced by the witness Brown, canal collector at Dayton, and mentioned in the abstract marked A, used as an index to the entries. (Ib. 23, 41.)

4. In admitting the portions of the certificate-book produced by the witness Carson, canal collector at Piqua, described in Exhibit B. (Ib. 23, 42.)

5. In admitting the portions of the certificate-book produced by the witness Messerole, canal collector at Cincinnati, and described in Exhibit C. (Ib. 24, 42.)

6. In admitting the railroad way-bills and each of them. (Ib. 27.)

7. In overruling defendants' motion to exclude said certificates and way-bills and each of them, and in refusing to exclude any of them. (Ib. 28.)

8. In instructing the jury as follows (Ib. 30, 36):

"The issues before you are very much simplified by the mutual admission that the time within which this wrong has been committed is between October, 1865, and September, 1866, a period of about ten months."

9. Also, in instructing the jury as follows (Ib. 30, 36):

"It is claimed that the evidence of these consignees, and especially the testimony of the way-bills, is very delusive; that it tends to duplication, and that you will be very likely to charge these defendants twice over with the same amount. So far as the nature of this testimony is concerned, there has been, in modern times, a very great change of opinion, and I do not know that if I should search all the books I ever read, or call to mind all my experience at the bar, I could select a more fitting instance to illustrate my own opinion of the respective values of these two classes of testimony, than the contrast between the persuasive effect of memoranda, made in the ordinary course of business by those who have no motive to falsify, whose duty it was to record them at the time the transaction took place, on the one hand, and on the other, the grossly conflicting verbal testimony given in this cause as to the amount of whisky on hand in October, 1865. Compare the two, and see upon which, in its own nature, as men of common sense, you can repose your credence with most confidence. The one is plain, simple, and direct—without a motive of falsification. The other presents a spectacle like this: A phalanx of twenty men swearing, on their oaths, to some two thousand barrels of whisky, at a given time, in a given place, and two-thirds as many—equally intelligent and equally respectable, with equal opportunities of knowledge—swearing there is not fifty barrels there. It is a hapless conflict, leaving the mind in uncertainty, with nothing whatever to rest upon."

10. Also, in instructing the jury as follows (Ib. 32, 37):

"The only liability to error is the danger of duplication. The way-bills, the railroad shipments, the canal-books, are attacked—not so much on account of what they say, as the danger that they may speak twice upon the same subject. But it would seem to me that such a mistake is wholly unnecessary. The date, the quantities shipped, the shipments themselves, the con-

signees' names, all unite in preventing confusion. After much reflection, I am unable to call to mind any direction whatever which it is my duty to give you in estimating this testimony. I am asked for none whatever on the part of the defendants. It seems plain and direct. The utmost which counsel have said of it is, that it lacks that demonstrative certainty—that it is not that full proof which the law demands in an action so highly penal as this. Gentlemen, this may be most fully conceded, and still the government be entitled to your verdict."

11. Also, in instructing the jury as follows (Ib. 32, 37):

"The proof in the outset may be defective; it may not be sufficient to enable you, without any doubt or hesitation, to find against the defendants, and still it may be your duty, nevertheless, so to find; for although I instruct you that the case must be made out beyond all reasonable doubt in this, as well as in criminal cases, yet the course of the defendants may have supplied, in the presumptions of law, all which this stringent rule demands. In determining, therefore, in the outset whether a case is established by the government, you will dismiss from your minds the perplexing question, whether it is so made out beyond all doubt. It needs not, in the exigencies of this case, be so proved in order to throw the burden of explanation upon the defendant, if from the facts you believe he has within his reach that power. In the end all reasonable doubt must be removed; but here, at this stage, you need say only, is the case so far established as to call for explanation?"

12. Also, in instructing the jury as follows (Ib. 32, 37):

"If, then, you conclude that, unexplained and uncontroverted by any testimony, the opening proof would enable you to find against the defendants for the claim of the government, or

any material part of it, you will then take up their testimony in view of the principle which has been so much discussed, and which the court announced at an earlier part of the trial. Although the counsel for the defense, when this principle was announced, with spirit and energy, begged leave to differ with the court in reference to the effect of not producing the books, and not swearing the defendant, still the presumption of law is that client and counsel have deliberately and with full knowledge of the law and all its presumptions elected to withhold this proof, and you will not in the smallest degree abate the full application of the principle on any notion that it may have been misapprehended. The rule is one which I am confident will commend itself to your common reason. It is this: Without exception, where a party has proof in his power which, if produced, would render certain material facts, the law presumes against a party who omits it, and authorizes a jury to resolve all doubts adversely to his defense. The same rule is applicable in a case where a party once had proof in his power which has been voluntarily destroyed or placed beyond his reach."

13. Also, in instructing the jury as follows (Ib. 33, 38):

"In 4 Howard Sup. Ct. Rep. 242, in a revenue case, and in reference to circumstances much like these this jury has to consider, it is said: 'Under these circumstances the claimant was called upon by the stronger consideration, personal and legal argument, to bring to his defense the best evidence under his control.' They add (p. 248): 'Practical illustrations of this rule are witnessed daily, in criminal cases, and are too familiar to require more particular reference.'"

14. Also, in instructing the jury as follows (Ib. 33, 38:

"As Judge Blatchford applies this principle to a defendant, who, in a case strikingly like this one, refused to contradict, under oath, a witness who swore to his confessions, I will, in connection with what he says, although somewhat out of the order I am following, ask your attention to what one of the government witnesses testified in reference to the defendant's admissions. He said the defendant told him, at the distillery, that he had little or no whisky there, some time in 1865. He testifies that in open court. The defendant sat by and heard it, but made no denial. It is not a matter for the jury to say that they will indulge in vague surmises in reference to the possibility of the witness being mistaken. The law, acting upon well-settled principles of common reason, says that when such testimony is given and the defendant is by and makes no denial, all doubts are resolved against him."

"Mr. FOLLETT. I would wish to state to your honor right there that this testimony was given in rebuttal, if your honor will recollect.

"COURT. That makes no difference whatever. That testimony could not have been put in chief, because it was not then applicable to the exigencies of the case. It was put in rebuttal, as the learned counsel well suggests, and to rebut what? They had introduced some twenty-three witnesses, who testified vaguely and loosely to estimates of whisky on hand, referring to anterior periods, endeavoring to recollect the observations which they then made; and to rebut that the government called a witness, who said, 'I conversed with the defendant at the distillery, and he told me he had little or no whisky there.' Whether it is put in rebuttal or in chief has no significancy whatever in reference to the application of this principle of presumption."

15. Also, in instructing the jury as follows (Ib. 34, 38):

"It is for you to say whether the defendant did or did not keep books of account. The testimony, however, upon this point seems to be uncontradicted, and that they consisted of day-

books, journals, and ledgers. You will act upon your own business knowledge of what in all probability those books contained. The presumption of law, I charge you, is that the defendant did keep the accounts usual and necessary for the correct understanding of so large a business, and the accurate accounting, from time to time, between the several partners interested in it."

16. Also, in instructing the jury as follows (Ib. 34, 39):

"I say to you that the books of the firm of which H. D. Chaffee was a member, he being dead, belonged of right and are assumed to be in possession of the surviving partners."

17. Also, in instructing the jury as follows (Ib. 34, 39):

"The law presumes, also, the books to be in existence and accessible to the defendant, S. L. Chaffee, and his co-defendants, unless the contrary is shown by the evidence. The declaration of counsel that they are in Buffalo, is not evidence of that fact, and, if it were, would in law constitute no excuse for their non-production, without further proof that upon diligent inquiry and effort they could not be produced."

18. Also, in instructing the jury as follows (Ib. 34, 39):

"If you believe the books were kept which contained the facts necessary to show the real amount of whisky in the hands of the defendants, in October, 1865, and the amount which they had sold during the next ten months, or that the defendants, or that either of them, could, by their own oath, resolve all doubts on this point—if you believe this, then the circumstances of this case seem to come fully within this most necessary and beneficent rule."

19. Also, in instructing the jury as follows (Ib. 34, 39):

"And now, in the light of this rule, let us proceed briefly to consider the defendants' case. And, first, I repeat, for the purpose of explanation only, that it is claimed, on the part of the defendant, the evidence of the government is uncertain, and may lead to duplication. Although you are to resolve all doubts against the defendant, this does not mean that, because the plaintiff makes a *prima facie* case for $750,000, you are to write that down inexorably and stop there. It means only that, if you believe such case is made, you are to start with that, and then carefully consider all the testimony, and, so far as you can, from any source, without any doubt or hesitation, mark out any or all of it, that you will so do. When there is certainty, this rule has no application. It is only where it is vague and doubtful that it comes in to relieve you from the doubt and perplexity which the silence of the defendant occasions."

20. Also, in instructing the jury as follows (Ib. 35, 39):

"Let us proceed, then, with the defendants' case. They say, grant what the government asserts—that we sold eight or nine thousand barrels of whisky during this time; we show you we paid tax on six thousand barrels, and that we had two thousand or three thousand on hand. How is this proved? Two intelligent parties, whom you are warranted in presuming must know with certainty this great leading fact, refuse to testify. The law accords to them liberty to speak, and yet they remain silent. The books are also withheld. As a substitute for these sources of certainty there are produced, as witnesses, some neighbors of the defendants—grocers, physicians, day-laborers, and farmers—who visited this distillery socially or on business. All these witnesses speak—and to this I ask your particular attention—of subsequent estimates made from recollection by

endeavoring to call to mind quantities which they saw at past periods. They differed greatly in their general aggregate, and still more so in the amounts which they testified to as being at different places on the premises. Had these twenty-three men professed to have visited this distillery for the purpose of making an examination, and while there, with the property before them, counted the tiers of barrels, and then and there estimated the quantity on the premises at two thousand five hundred barrels, and twelve others, equally intelligent and capable of observation, had sworn that they, too, went there for a like purpose, and, after diligent search, could find only some twenty-five in all—some of them working in the rooms, others storing property in them, and still others removing floors from the very apartments where these conflicting oaths located the greatest amounts of whisky—then there would be no room for reconciliation or charity. The conflict would be too gross to call it misapprehension. Perjury, beyond all doubt, would have been committed. But you have no such case before you. Neither party professes to have made an estimate then and there, with the property before them; but each witness relies upon recalling what he had neither duty nor interest to observe at the time, and make measurements and form opinions as to the quantities only from what he remembers of the past. There is much liability for mistake on both sides in all such instances. Had this case been less important, and the expense and trouble of its retrial less, I am not at all certain but that I should have excluded this testimony altogether, trusting that a higher court would have upheld my decision in reference to what I concede would be a new step in practice.

"And now, gentlemen, in this state of facts, what should be your application of the rule of law that doubts should be resolved against the defendants? You certainly, it would seem to me, will be unable to fix, with entire confidence, upon any specific amount of whisky on hand in October, 1865. It certainly presents a case where you can not say but there is doubt. It is a doubt in the power of the defendant to remove. If he does not do so, the law pronounces what your duty is."

21. Also, in instructing the jury as follows (Ib. 35, 40):

"If you believe that there have been any additions made, by or with the concurrence of the defendants, to this book, for the purpose of creating proof contrary to the truth, it also, perhaps, in an equal degree with any other facts in the case, raises a strong presumption against them. Here is an entry at the foot of the page: 'Stopped this day; 2,056 barrels on hand in cribs and building.' There is no other entry in the book like it. Its whole theory seems to be at war with the entry. You will observe the first one, which says 227 barrels on hand, is but a few months before, in December, 1863. Why 'in cellar' should be added to several of these entries when at this very period it is claimed there were several thousand barrels in the other departments, is not shown. By looking back in the book you will find blanks left all the way through, where these entries in red ink might have been made for any distance back. It is just in this period that the exceptional entry is made, and nowhere else, and to that I deem it my duty particularly to call your attention."

22. Also, in instructing the jury that all doubts which might have been removed by the production of defendants' books should be resolved against the defendants, as excepted to by the defendants *fifteenthly*. (Ib. 40.)

23. Also, in instructing the jury that all doubts should be resolved against the defendants which might have been removed by their testifying, as excepted to by the defendants *sixteenthly*. (Ib. 40.)

24. Also, in instructing the jury as a presumption of law, that all doubts were to be resolved against the

defendants which might be removed by their testifying or producing their books, as excepted to by the defendants *seventeenthly*. (Ib. 41.)

25. Also, in instructing the jury that although it was necessary in the end for the government to prove its case beyond a reasonable doubt, such doubt might be removed by circumstances showing that the defendants had in their power to produce proof which would render certain that which was otherwise uncertain in the case, and omitted to do so, as excepted by the defendants *eighteenthly*. (Ib. 41.)

26. Also, in instructing the jury that—

> "Without exception, when a party has proof in his power, which if produced would render certain material facts, the law presumes against a party who omits it, and authorizes a jury to resolve all doubts adversely to his defense."

As excepted to by the defendants *nineteenthly* (Ib. 32, 41.)

ARGUMENT.

The discussion of the legal questions, presented by the foregoing assignment of errors, naturally divides itself into three parts, having relation (1) to the overruling of the demurrer, and of the motion in arrest of judgment; (2) to the exceptions arising upon the admission of the canal certificates and railroad way-bills, and the refusal to grant the defendants' motion to exclude them; and (3) to the exceptions to the charge. Both the demurrer and the motion in arrest of judgment present the same objections to the declaration; therefore, although the action of the government, in submitting to the discharge of William M. Chaffee, was subsequent to the disposal of the demurrer, and the question of its effect was, and could be, presented only by the motion in arrest of judgment, we prefer to consider them at the same time, although chronologically they are the first and last errors assigned in the case. If we are right in either, then the case must end here, and there will be no need of any decision of the other questions in the case.

I.

Did the Court below err in overruling the demurrer, or the motion in arrest of judgment?

1. The action was brought and is sought to be maintained under the 48th section of the act of June 30, 1864, "to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes." (13 Statutes at Large, 240.) The following is the entire section, with the marginal notes, as printed "by authority of Congress." We have taken the liberty of italicizing the portion claimed to have authorized this prosecution:

Certain goods, etc., designated to be sold, etc., in fraud of the revenue, to be forfeited, etc.

"SEC. 48. *And be it further enacted*, That all goods, wares, merchandise, articles or objects on which duties are imposed by the provisions of law, which shall be found in the possession or custody or within the control of any person or persons, for the purpose of being sold or removed by such person or persons in fraud of the internal revenue laws, or with design to avoid payment of said duties, may be seized by any collector or deputy collector, who shall have reason to believe that the same are possessed, had, or held for the purpose or design aforesaid, and the same shall be forfeited to the United States; and also all articles of raw materials found in the possession of any person or persons intending to manufacture the same for the purpose of being sold by them in fraud of said laws, or with design to evade the payment of said duties, and also all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or inclosure where such articles on which duties are imposed, as aforesaid,

and intended to be used by them in the fraudulent manufacture of such raw materials, shall be found, may also be seized by any collector or deputy collector, as aforesaid, and the same shall be forfeited as aforesaid; and the proceedings to enforce said forfeiture shall be in the nature of a proceeding *in rem* in the Circuit or District Court of the United States for the district where such seizure is made, or in any other court of competent jurisdiction. *And any person who shall have in his custody or possession any such goods, wares, merchandise, articles or objects subject to duty as aforesaid, for the purpose of selling the same with the design of avoiding payment of the duties imposed thereon, shall be liable to a penalty of five hundred dollars, or not less than double the amount of duties fraudulently attempted to be evaded, to be recovered in any court of competent jurisdiction;* and the goods, wares, merchandise, articles or objects which shall be so seized by any collector or deputy collector, may, at the option of the collector, during the pendency of such proceedings, be delivered to the marshal of said district, and remain in his care and custody and under his control until final judgment in such proceeding shall be rendered:

Forfeiture, how enforced.

Penalty on person having such goods in his custody, etc.

"*Provided, however*, That when the property so seized may be liable to perish or become greatly reduced in value by keeping, or when it can not be kept without great expense, the owner thereof, the collector, or the marshal of the district, may apply to the assessor of the district to examine said property; and if, in the opinion of said assessor, it shall be necessary that the said property should be sold to prevent such waste or expense, he shall appraise the same; and the owner thereupon shall have said property returned to him upon giving bond in such form as may be prescribed by the commissioner of internal revenue, and in an amount equal to the appraised value, with such sureties as the said assessor shall deem good and sufficient, to abide the final order, decree, or judgment of the court having cognizance of the case, and to pay the amount of said appraised value to the collector, marshal, or otherwise, as he may be ordered and directed by the court, which bond shall

Perishable articles.

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and intended to be used by them in the fraudulent manufacture of such raw materials, shall be found, may also be seized by any collector or deputy collector, as aforesaid, and the same shall be forfeited as aforesaid; and the proceedings to enforce said forfeiture shall be in the nature of a proceeding *in rem* in the Circuit or District Court of the United States for the district where such seizure is made, or in any other court of competent jurisdiction. *And any person who shall have in his custody or possession any such goods, wares, merchandise, articles or objects subject to duty as aforesaid, for the purpose of selling the same with the design of avoiding payment of the duties imposed thereon, shall be liable to a penalty of five hundred dollars, or not less than double the amount of duties fraudulently attempted to be evaded, to be recovered in any court of competent jurisdiction;* and the goods, wares, merchandise, articles or objects which shall be so seized by any collector or deputy collector, may, at the option of the collector, during the pendency of such proceedings, be delivered to the marshal of said district, and remain in his care and custody and under his control until final judgment in such proceeding shall be rendered:

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Perishable articles.

be filed by said assessor with the commissioner of internal revenue. But if said owner shall neglect or refuse to give said bond, the assessor shall issue to the collector or marshal aforesaid an order to sell the same; and the said collector or marshal shall thereupon advertise and sell the said property at public auction in the same manner as goods may be sold on final execution in said district; and the proceeds of the sale, after deducting the reasonable costs of the seizure and sale, shall be paid to the Court aforesaid, to abide its final order, decree, or judgment."

The Court will notice that this was not an action against a party in whose hands distilled spirits were found and seized, charging him with their *then* possession, viz., at the time of seizure, for the purpose of selling with the design of avoiding payment of the taxes. On the contrary, it was brought long after the event, and without seizure, and can only be sustained on the theory that where a party *has had* in his possession distilled spirits for the purpose of selling the same with the design of avoiding payment of taxes, he remains forever liable for double taxes, to be recovered as penalties, although he may have repented and paid the taxes. Under this theory there is no *locus penitentiæ* for such party. If, for one moment, he being in possession and designing to sell, conceives the purpose of avoiding payment of taxes, he becomes liable, although no overt act follows, and the taxes are in fact afterwards paid. It will require strong language and clear and precise expressions to justify such construction.

The act makes custody or possession, for the *pur-*

pose of selling, with the design of avoiding payment of the duties imposed, an offense punishable by the penalty of five hundred dollars, or double the amount of duties imposed. The offense is the "*custody or possession*" for the purpose of selling, with the unlawful design, not the actual sale. It is the attempt, not the act, that is punishable, as is proved by the penalty, "double the amount of duties fraudulently *attempted* to be evaded." The declaration in such case is no less demurrable, because it adds an allegation that the purpose was accomplished by the sale of the goods and the evasion of the duties. That averment is immaterial: the office of the act being accomplished by the punishment of the person having in his custody or possession such goods, and the necessary averments being (1) custody or possession; (2) *purpose* to sell (not actual sale), and (3) design to avoid payment of duties.

Our view of the section is quite different from that of the pleader here. We regard the whole section as homogeneous; and that its purpose was to insure the forfeiture of dutiable articles, together with raw materials and tools, etc., "*found*" in the possession or custody or within the control of any person for this unlawful purpose, and the punishment of the person in the custody or possession of "*such* goods." The act does not refer to a design merely conceived or entertained by the owner of dutiable property, to sell it with the design of defrauding the government. It is

aimed at an overt act, a fraudulent attempt, and this is defined as custody, possession, or control, for the purpose of selling or removing, and not merely possession or control coincident with such purpose. In other words, the punishable possession is not that which is simultaneous with, but that which is "*for the purpose*" of fraud. The object, the *raison d'être* of the possession, must be shown to have been, at the time of seizure, the unlawful purpose. In our view, it is not sufficient that the possession was accompanied by this purpose, if originally lawful, and such purpose was not the reason and object of the possession. Otherwise, whisky found in the custody or possession of the manufacturer, before he has violated any provision of the act, would be liable to be seized simply because he has harbored the thought of fraud; and even if not liable to seizure after he has repented and abandoned the purpose, he himself would be chargeable with having once had possession with the unlawful purpose, and liable to the double taxes by way of penalty, though he may have actually paid the taxes, unless he may be relieved by what seems to us the necessary limitation of the penalty to the person in possession of "*such* goods," that is to say, goods seized under the provisions of the same section.

The case of the government depends upon whether in the third count of the amended declaration (Record, 11), an offense is, by proper averments, charged to have been committed by the defendants within the true meaning of the act. The dates between which the wrong is said

to have been done are February 1, 1865, and September 1, 1866. Suit was brought February 19, 1867; so that the offense was a past possession. It is true that the declaration informs us that the distilled spirits had been actually sold, and payment of the duties successfully avoided; but, as this was not punishable by the recovery of double duties, it constituted no part of the offense, and, properly speaking, no part of the count, which, in law, consists of those averments alone that are properly pleaded, the demurrer admitting their truth only, and nothing more. The only effect of this averment, if, indeed, it have any, is to negative by argument any possible implication that the defendants might have been "found" in the fraudulent attempt.

If this count be good pleading, it is really remarkable that the actual sale in pursuance of the unlawful design should not have been punished by a penalty. If the declaration be not demurrable, it is because one may rightly espouse what seems to us the absurd proposition that mere possession, with the purpose to sell with design to avoid payment of the tax, a case in which proof of the design is extremely difficult, or where proof is made by the sale itself, is punishable by penalties, and that the actual sale with such illegal purpose is not punishable as such at all, or only punishable under the 180th section, by inability to enforce the sale, or liability to a *qui tam* action. It is true that under the 180th section, in case of executed sale, a *qui tam* action is given for the amount paid by the purchaser, the proceeds to

be divided, when recovered from the seller—one-half to the United States, the other half to the person who has seen fit to bring the action. But this section only serves to bring into bolder relief the absurdity of the construction contended for by the government; for it oddly happens under this construction that, whereas in the case of mere possession, not followed by any overt act, or even ending in repentance and the payment of the tax, the person entertaining the criminal purpose to sell, with the design of avoiding payment of taxes, may be visited at any time with the penalty of double taxes, yet if he has consummated his sale without having had actual possession, he is not liable to any prosecution by the United States at all, but only rendered unable to collect while his sale remains executory, or if it has been executed, is subjected to the *qui tam* action we have described.

And the goods, if not "found" in possession for the purpose of fraud, as where they had been sold to a *bona fide* purchaser who believed, and had reason, being deceived by simulated brands or otherwise, to believe that the duties had been paid, are no longer subject to seizure under this section. Moreover, on the theory of the government, as many persons as could be shown to have entertained, even though they might have abandoned, without consummating, the unlawful purpose, remain liable to the penalty, not jointly, but severally, so that it might happen that the duties would be recoverable, not twice, but many times on one consignment of whisky.

These considerations impress us very strongly with the conviction that we shall not, in reading the language relied on by the government, find that it means what is supposed. The *a priori* argument is against the government, and if the language bears as naturally, or more naturally, a different meaning from that for which it contends, these considerations require its adoption. The language which is relied on, we repeat, is found in the *body* of the 48th section, as follows: "And any person who shall have" (not "*have had*") "in his custody or possession any *such* goods, wares, merchandise, articles or objects subject to duty as aforesaid, for the purpose of selling the same, with the design of avoiding the payment of the duties imposed thereon, shall be liable to a penalty of $500, or not less than double the amount of duties fraudulently attempted to be evaded, to be recovered in any court of competent jurisdiction." Assuming that this language is to be construed liberally, we still deny that it is possible to give to it the meaning suggested by the government. Its contention in this regard is overcome by the following, among other considerations:

First. These words are taken from the body, or as Mr. Benton would have called it, the belly of the section. They are, therefore, to be construed by the context as part of the section, not as an independent provision, nor dissevered from the rest of the section, as our learned antagonists must contend.

Secondly. The object of the section is to impose

punishment, not upon a person who has had or has executed a criminal design, but upon one caught in *flagrante delicto*, in whose possession, custody, or control is "found" property, "for the purpose of being sold or removed by such person or persons in fraud of the internal revenue laws, or with design" to avoid payment of the duties imposed thereon. This property may be seized and forfeited. It needs no more than a cursory examination of the section to show that this is its primary intention, and that any punishment by penalties is additional and auxiliary, and to be construed with reference to the chief purpose and leading design of the lawgiver.

Thirdly. Coming now to a closer and more critical examination of the very words in question, we find this view sustained and indeed absolutely necessary. The sentence does not read "any person who shall *have had* in his custody or possession any goods, wares, merchandise, articles, or objects, subject to duty as aforesaid, for the purpose of selling the same with the design of avoiding payment of the duties imposed thereon, shall be liable," etc., but it does say, "*and* any person who shall *have* in his custody or possession any *such* goods," etc. The use of the conjunctive conjunction "*and*," indicates continuity of thought and connection with the prior sentence, and that sentence is descriptive of the method of enforcing a forfeiture. The use of the verb "*have*" instead of "*have had*," indicates that it was not the intention to include persons

who *had* entertained the unlawful design while in possession of taxable goods, but those only who may be found in such possession, while engaged in such fraudulent attempt, and against whom the remedy of seizure and forfeiture may be resorted to.

Fourthly. Still more decisive is the use of the word "*such*," "*such goods*," etc. Now "*such*" does not mean "subject to taxation," for the words are, "Any *such* goods, wares, merchandise, articles, or objects, *subject to duty as aforesaid.*"

What then does the word "*such*" mean in this connection? There can be but one answer to this question, and that is fatal to the contention of the government.

The word is a relative: its antecedent must be sought in the prior part of the section. It is found in the very opening of the section in these words. "That all goods, wares, merchandise, articles, or objects on which duties are imposed by the provisions of law *which shall be found in the possession or custody or within the control of any person or persons, for the purpose of being sold or removed by such person or persons in fraud of the internal revenue laws, or with design to avoid the payment of said duties*, may be seized," etc. In other words, "such goods, etc., subject to duty as aforesaid," can only be *seized* goods, *forfeited* goods, or rather goods subject to duty which shall be "*found*" in the possession, custody, or control of any person entertaining such unlawful design.

This word "such" is used repeatedly in the section as a relative; thus, all raw materials, and all tools, etc., in the building, yard, etc., where "*such* articles on which duties are imposed, as aforesaid," etc., intended to be used in the fraudulent manufacture of "*such* raw materials," etc., shall be found, may also be seized. Next is the provision that the proceeding shall be in the district where "*such* seizure is made," and next that now in question, and in which, as it seems to us, the word is used in the same signification, and lastly, just before the proviso, it is ordered that the goods may remain in the marshal's custody "until final judgment in *such* proceeding shall be rendered." *Such* proceeding does not, surely, here refer to any other than that described in the earlier portion of the section, viz., that prosecuted to forfeit the goods.

Fifthly. The whole sentence from which has been quoted the words relied on by the government, must be read together and not divided. It does not end with the quotation already made, for after providing for the penalties in question, to be imposed on any person who shall "have in his possession any such goods," etc., "to be recovered in any court of competent jurisdiction," it continues, "*and* the goods, wares, merchandise, articles, or objects *which shall be so seized*, by any collector or deputy collector, may, at the option of the collector, during the pendency of such proceedings, be delivered to the marshal of the district, and remain in his care and custody and under

his control, until final judgment in such proceeding shall be rendered." To sustain the theory of the government, then, we must suppose that the mind of the law-maker, occupied in the earlier part of the section wholly with considerations pertaining to those only who might be *found* in possession with unlawful design, and to the seizure and forfeiture of their goods, leaps violently, like an acrobat, in defiance of the conjunctive conjunction "and," which on this theory is a mere false pretense (for it indicates continuity of thought and that no leaping at all is done), to the punishment of those who at any time entertained such design, whether found in possession or not. And that with equal agility, but without leaving the sentence, it jumps back to the disposition of the goods so seized. Such inconsecutiveness is rarely found among members of Congress and lawyers; indeed, we had supposed it confined to ladies of the Mrs. Nickleby style of conversation.

Sixthly. The construction we put upon the 48th section is strongly supported by the 45th section of the act of 1866. This section does not repeal or profess to repeal the 48th section of the act of 1864. It either provides punishments for other offenses, or cumulates penalties. The natural presumption is against the latter theory. And yet if this be not so, it must be because the 48th section does not apply except in the case of a seizure, when the person is "found" in possession of goods, not *otherwise* unlawfully held, but neverthe-

less held with design to avoid payment. For in the case of a person guilty of removing distilled spirits, not into a bonded warehouse, and selling them, the result of the construction we object to would be that the offender would be liable, *first*, under section 45, to a fine of double the amount of tax; *secondly*, to a *qui tam* action, under section 180, for the price at which the goods were sold; *thirdly*, under section 48, to a penalty of double the tax for having entertained the unlawful purpose, before or at the time he parted with possession.

So far from repealing the 48th section, the act of 1866 expressly re-enacted it, changing only the word "duties" to "taxes." (14 Stat. at Large, 111.) The 45th section of the act of 1866, which it is therefore manifest was, in the mind of the lawgiver, consistent with the 48th section of the act of 1864, and therefore designed to impose punishments for offenses not reached by the latter, provides (Ib. 163) that a person who shall remove distilled spirits from the place where distilled, except into a bonded warehouse, shall be liable to a fine of double the amount of tax, or imprisoned not less than three months; that the spirits may be seized and forfeited, or may be seized and after assessment of the tax thereon, sold for payment of the taxes; that the burden of proof shall be upon the claimant; and that any person aiding or abetting shall be liable to a fine of from $200 to $1,000, or imprisonment from three to twelve months.

And yet, if this case, as described in the declaration, had occurred after September 1, 1866, when the act of 1866 took effect as to distilled spirits (14 Stat. at Large, 168), and the government's construction of section 48 be correct, the defendants would have been liable to double taxes, under section 48, for entertaining the design to sell to avoid payment of taxes, and under section 45, for removing from their distillery otherwise than to a bonded warehouse, to a fine of double the amount of taxes, or imprisonment. Of course the government must maintain that Congress intended thus to cumulate penalties.

Seventhly. By section 48 the goods are forfeited, if "found in the possession or custody, *or within the control* of any person or persons for the purpose," etc.; but he only is liable to the penalty of double taxes who may have in his *custody or possession* any such goods," etc.

The conclusion is obvious:—if the unlawful purpose be entertained by the person *in control*, even if he be not in actual custody or possession of goods, the goods shall be forfeited, but before the person found in actual custody or possession can be visited with the penalty, he must be shown to have been a partaker of the purpose. The penalty, therefore, is imposed, not upon persons out of actual possession but in legal control of the goods, but upon those in custody or possession, though not in control of the property. This renders it still more plain that the penalty here is the punishment imposed, where goods are seized,

under the section, upon those found in the custody or possession with the unlawful purpose, or, in other words, detected in the fact of the fraudulent attempt.

Eighthly. Nor is any such construction necessary for the protection of the government, or the punishment of the wrong-doer.

By section 57 of the act of 1864 (13 Stat. at Large, 243), every distiller was required to make two daily entries, in a book to be kept for that purpose, of the number of gallons distilled, placed in warehouse, sold, or removed for consumption or sale, and the proof thereof, which book was always to be open for the inspection of the assessor, collector, and inspector; and the distiller was also required to make returns to the assessor on the first, eleventh, and twenty-first days of each month, or within five days thereafter, in duplicate, of the number of gallons distilled, sold, or removed for consumption or sale, and the proof thereof; and to verify these entries and returns upon oath, and pay the duties on the spirits so distilled and sold. See also sec. 62 (Ib. 246.

And by section 68 (Ib. 248), the

> "Owner, agent, or superintendent, who shall neglect or refuse to make true and exact entry of the same, and to do or cause to be done any of the things by law required to be done as aforesaid, shall forfeit for every such neglect or refusal all the liquors and spirits made by or for him, and all the vessels used in making the same, and the stills, boilers, and other vessels used in distillation, together with the sum of five hundred dollars, to be recovered with costs of suit."

And by section 69 (Ib. 248), where duties on distilled spirits were not paid "at the time of rendering the account of the same, or at the time when they shall have become payable as herein required," ten per centum was added to the duties, and the duties, with this addition, charged by way of lien upon the distillery and the land upon which it was situated, and might also be collected "by distraint and sale of the goods, chattels, and effects of the delinquent."

The 14th section (Ib. 226) provided that:

"If any person, on being notified or required to present to the assessor the list or return required, shall refuse or neglect to give such list or return within the time required, as aforesaid, *or if any person shall not deliver a monthly or other list or return*, without notice, at the time required by law, *or if any person shall deliver or disclose to any assessor or assistant assessor any list, statement, or return, which, in the opinion of the assessor, is false or fraudulent*, or contains any under-statement or under-valuation, it shall be lawful for the assessor to summon such person, his agent, or other person having possession, custody, or care of books of account containing entries relating to the trade or business of such person, or any other persons, as he may deem proper, to appear before such assessor and produce such book, at a time and place therein named, and to give testimony or answer interrogatories under oath or affirmation respecting any objects liable to duty or tax as aforesaid, or the lists, statements, or returns thereof," etc.

And the section provided for the service of the summons, and for an attachment to be issued by the judge of the District Court, or a commissioner, to

compel an obedience to the summons, and to punish disobedience, and then continued:

"It shall be the duty of the assessor or assistant assessor of the district within which such person shall have taxable property to enter into and upon the premises, if it be necessary, of such person so refusing or neglecting, or rendering a false or fraudulent list or return, and to make, according to the best information which he can obtain, including that derived from the evidence elicited by the examination of the assessor, and on his own view and information, such list or return, according to the form prescribed, of the property, goods, wares, and merchandise, and all articles or objects liable to duty or tax, owned or possessed or under the care or management of such person, and assess the duty thereon, including the amount, if any due, for license and income; *and, in case of the return of a false or fraudulent list or valuation, he shall add one hundred per centum to such duty; and, in case of a refusal or neglect*, except in cases of sickness or absence, *to make a list or return, or to verify the same as aforesaid, he shall add fifty per centum to such duty;* and, in case of neglect, occasioned by sickness or absence as aforesaid, the assessor may allow such further time for making and delivering such list or return as he may judge necessary, not exceeding thirty days; and the amount so added to the duty shall, in all cases, be collected by the collector at the same time and in the same manner with the duties; and the lists or returns so made and subscribed by such assessors or assistant assessors shall be taken and reputed as good and sufficient lists or returns for all legal purposes."

Section 15 imposed a fine of $1,000, or imprisonment not exceeding one year, or both, at the discretion of the Court, with costs of prosecution, for delivering a false or fraudulent list, return, account, or statement,

with intent to defeat the valuation, enumeration, or assessment intended to be made, or for neglecting to appear or produce books when summoned to testify under section 14.

Section 16 authorized a list to be made by the assessor of any property in any district, liable to be taxed, and not owned or possessed by any person within the district.

In view of these sections, it certainly can not be contended that there was not power sufficient to rectify any fraud or omission of H. D. Chaffee & Co., in their tri-monthly returns of distilled spirits. That does not appear to us a possible construction of the statute, which would expose the distiller to a penalty of double taxes for entertaining the design to defraud, and the same penalty, viz., of one hundred per cent. added to the taxes, by the assessor, under section 14, for making false returns.

Whereas, under the construction for which we contend, this cumulation of penalties is obviated; and the Court will not be compelled to enforce the foolish rule that the purpose to sell was more offensive and more highly punishable than the actual sale; the design to avoid payment more criminal than the overt act of fraud, which combines design and accomplishment: nor will proof again be made, as was done in this case, of unlawful possession, by showing non-possession.

2. This is an action of *debt* brought, as shown by the writ (Record, 1), and declaration (Ib. 8, 9, and 11), against "Highland D. Chaffee, Sidney L. Chaffee, *William M. Chaffee*, and Rue P. Hutchins, partners (or as the declaration says, 'late partners), as H. D. Chaffee & Co.'" During the progress of the cause Highland D. Chaffee died. William M. Chaffee, by plea (Ib. 15), traversed the averment that he was a partner in the firm of H. D. Chaffee & Co., and the jury having been sworn and testimony given, the district attorney abandoned the claim against him, and it was entered upon the journal of the Court (Ib. 17), that the plaintiffs

> "In open Court confess that they will not further prosecute said William M. Chaffee on either count of the declaration, or on the issues above joined between plaintiffs and said William M. Chaffee; it is therefore ordered that said William M. Chaffee be thereof acquit, and go hence without day."

Sidney L. Chaffee and Rue P. Hutchins, the plaintiffs in error, pleaded both not guilty and *nil debet* (Ib. 14). And the verdict was (Ib. 18),

> "That the defendants doth *owe* to the plaintiffs the sum of two hundred and thirty-five thousand six hundred and eighty dollars, in manner and form as the said plaintiffs hath complained against them, and they assess the damages of the plaintiff by reason of the detaining the same at one cent."

Our contention was, upon the motion in arrest of judgment, that this verdict was as bad in law as in

grammar; that this being an action *ex contractu*, upon an issue made up in part by the plea of *nil debet*, and the verdict expressing, not that the defendants are guilty, but that they *owe*, there could be in law no judgment against less than the whole number of those original defendants who were surviving, except upon a plea of personal disability of the acquitted defendant, not inconsistent with the truth of the declaration, as of lunacy, coverture, infancy, bankruptcy. But here the verdict itself, taken in connection with the entry made upon the plea of William M. Chaffee, shows that the declaration was not true, and that the plea of *nil debet* was strictly true, that Sidney L. Chaffee and Rue P. Hutchins did not owe the plaintiff in manner and form as the plaintiff had alleged against them.

To this the answer is attempted, that this is not an action *ex contractu*, but *ex delicto*; that, therefore, there might be a verdict against part only of the defendants; that the allegation of partnership is matter of description, but not of essential description, and may be rejected.

To class the action of debt among actions *ex delicto*, seems to us a misuse of language. The tort is waived, and reliance placed on an implied obligation, by the very form of action adopted. The authority for this theory of the law is very high.

Mr. Justice Blackstone, 3 Com. 159, speaking of implied contracts, says:

"Of this nature are such as are necessarily implied by the fundamental constitution of government, to which every man is a contracting party. And thus it is that every person is bound and hath virtually agreed to pay such particular sums of money as are charged on him by the sentence, or assessed by the interpretation of the law; for it is a part of the original contract entered into by all mankind who partake the benefits of society, to submit in all points to the municipal constitutions and local ordinances of that state of which each individual is a member. Whatever, therefore, the laws order any one to pay, that becomes instantly a debt which he had beforehand contracted to discharge."

And upon this ground, this greatest of English commentators rests the right to bring the action of debt on judgment, or for a forfeiture or penalty. (Page 164.)

Chief Baron Comyn takes the same view (3 Comyn's Dig. Debt, A. 1):

"Debt lies upon every *contract*, *in deed or law*. As if an act of parliament gives a penalty, and does not say to whom nor by what action it shall be recovered, an action of debt lies upon such statute by the party grieved."

So also Mr. Justice Smith Thompson in *Stearns et al.* v. *United States*, 2 Paine, 301, 311:

"Actions for penalties are civil actions, both in form and in substance, according to Blackstone. The action is founded upon that implied contract which every person enters into with the state to obey its laws."

So also the Supreme Court of Massachusets, more than once, viz., in *Stilson* v. *Tobey*, 2 Mass. 521, where

it was held that *nil debet* is the more proper plea in debt for a penalty. See also 2 Greenl. on Ev., sec. 280. Also in *Hill and wife* v. *Joshua and Elizabeth Davis, Ex'rs*, 4 Mass. 139, 140. This was an action of debt *qui tam* for not causing a will to be proved or presenting it to the probate judge in due time. Chief Justice Parsons says:

"In this case the plaintiffs might have demanded a several forfeiture from Joshua; but they have demanded, in an action of debt, a joint forfeiture of both the executors, and the defendant, by pleading, denies that he owes a forfeiture jointly with the other; and upon this evidence it is very clear that the issue was with him, for the other executor had incurred no forfeiture. In *informations*, on penal statutes, for forfeitures incurred by malfeasances, on not guilty pleaded, the jury may convict some of the whole or part of the offense charged, and may acquit others; for the malfeasance in an information is several, as well as joint, and in such information judgment may be rendered against the defendants as trespassers. But this action is *ex contractu*, in which a joint forfeiture is demanded as a joint debt."

To the same effect is *Burnham* v. *Webster*, 5 Mass. 270, in which Chief Justice Parsons says:

"But if debt *qui tam* be sued against several, demanding a joint forfeiture, on a plea of *nil debet*, all the defendants ought to be found indebted, because the form of the action and plea is on a joint contract, although the debt arises from a tort."

The action in *Burnham* v. *Webster* was brought, in debt, to recover four penalties, of fifteen dollars each, for taking fish by a seine or drag-net, against the form of the statute.

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The weight of these great authorities—Comyn, Blackstone, Thompson, and Parsons, the first names on either side the Atlantic—can not be set aside by a passage of Chitty on Pleading, sustained by a case in Carthew, a reporter, the accuracy of whose work Lord Thurlow questioned (Wallace's Reporters, 246), even although Lord Holt may have made the decision, and by another case copied from manuscript as a note to 2 East, 569, and by a number of other cases without pertinency to the point. It is very true that "not guilty" has been held to be a proper plea in such cases, though *nil debet* is preferred. It is also true that in this case both were pleaded. But the form of action was *debt;* the verdict was *debent;* and the idea of debt implies a civil contract. If debt were brought upon the record of a judgment recovered in an action of trespass *vi et armis*, it would not be called an action *ex delicto*, nor would it be pretended that some could be held, not all. And yet wherein do the cases differ? In both, the original cause of action was a malfeasance; the immediate wrong is the non-payment of a sum of money ascertained by law. That the duty to pay the money is, in the one case, declared by the judicial, in the other by the legislative department of government, makes no difference. In both, the action is upon a contract implied by law, for an amount liquidated by the agency of the state.

3. *The judgment denies the truth of the writ and declaration in an essential particular.*

We have already called attention to the fact that the writ and declaration both describe the four original defendants, Highland D., Sidney L., and William M. Chaffee, and Rue P. Hutchins, as partners (or late partners) as H. D. Chaffee & Co. The *third* count of the amended declaration, upon which the verdict and judgment are based, averred that "*the defendants*," between February 1, 1865, and September 1, 1866—

"Were and still are citizens and residents in the town of Tippecanoe, in the county of Miami, in the State of Ohio, and in the fourth collection district of internal revenue of said State of Ohio; . . . that, as such citizens and residents, they, the defendants, did, from time to time, between the dates aforesaid, at said town, county, state, and district, *carry on and transact the business of distillers of spirits, under said firm name of H. D. Chaffee & Co.*, for which *they* were duly licensed by the proper United States authorities thereto duly empowered by law, and were then and there and thereby, and by reason of *their transacting and carrying on said business* in said town, county, state, and district, and by virtue of the provisions of said act of Congress and the said several acts amendatory thereof, bound to pay all the revenue and taxes thereby imposed on *them*, *on their said business*, *and on their said property*; and *said defendants* were bound by said law to comply with all the provisions of the act of Congress aforesaid, and the said several acts amendatory thereof, in reference to *their said business* and the distilled spirits so *by them* manufactured and distilled. Nevertheless *the defendants*, contriving and intending to evade the payment of *their* just and lawful taxes in that behalf payable, . . . and with intent to evade the payment of the lawful duties upon certain, to wit, two hundred thousand gallons of distilled spirits, *by them distilled*

at their distillery as aforesaid, did, . . . unlawfully, knowingly, and fraudulently, have in *their* custody and possession, and under their control, said two hundred thousand gallons of distilled spirits, . . . for the purpose of selling the same, with the design of avoiding the payment of the duties imposed by law thereon," etc., etc.

Section 82 of the act of June 30, 1864 (13 Stat. at Large, 258), enacts—

"That every individual, partnership, firm, association, or corporation (any word or words in this act indicating or referring to person or persons shall be taken to mean and include partnerships, firms, associations, or corporations, when not otherwise designated, or manifestly incompatible with the intent thereof), shall comply," etc.

By virtue of this parenthesis, we are compelled to read section 48 as if it had been written—

"And any *individual*, *partnership*, *firm*, *association*, *or corporation*, who shall have in his or their custody or possession any such goods, . . . subject to duty as aforesaid, for the purpose of selling the same with the design of avoiding payment of the duties imposed thereon, shall be liable to a penalty of . . . not less than double the amount of duties fraudulently attempted to be evaded," etc.

The offense is one, therefore, that might be committed by a firm. The penalty is imposed upon the firm, if the wrong be done by it. The declaration charged that Highland D. Chaffee, Sidney L. Chaffee, William M. Chaffee, and Rue P. Hutchins, composing the firm of H. D. Chaffee & Co., owed the penalty,

because, being partners, and, as such, licensed distillers, they manufactured distilled spirits in their distillery, and had said spirits, so manufactured, in their custody as such partners, with the fraudulent purpose. William M. Chaffee pleaded that he was no such partner, and the district attorney took issue by replication traversing the plea (Record, 15), and the jury were sworn to try this, with the other issues. And the government submitted to judgment against them on this issue.

In *Graves et al.* v. *Boston Marine Ins. Co.*, 2 Cranch, 419, it was held that—

> "The interest of a copartnership can not be given in evidence on an averment of individual interest: nor an averment of the interest of a company be supported by a special contract relating to the interest of an individual."

In cases of mere variance, it is true that the objection should be made to the introduction of the testimony, but this is no case of variance. Here the judgment is at war with the writ. And the only question is, is the conflict fatal? It certainly is so, if the discrepancy be not immaterial. And *Graves* v. *Boston Marine Ins. Co.* proves that it is material.

Again, matter of essential description must be strictly proved. 1 Greenl. on Ev., secs. 56, 58; 2 Ib., sec. 483.

In *Walters* v. *Mace*, 2 Barn. & Ald. 756, an action on the case for malicious prosecution of the plaintiff,

for felony, before Baron Waterpark of *Waterfork*, proof of such prosecution before Baron Waterpark of *Waterpark*, was held fatally variant.

So in an action on the case for deceit in a sale, alleged to have been made by the two defendants, proof of a sale by one was held insufficient. *Weall* v. *King et al.*, 12 East, 452.

This can not be said to be matter of inducement, for the very wrong itself is charged to have been done by the defendants, in their partnership capacity, and not otherwise, and by each defendant as a partner with all the others. As the firm might, under the statute, be guilty, and thus incur the penalty, the government, by electing to pursue these partners as a firm, has precluded itself from disputing the truth or the importance of its own averment, except at the expense of the right of recovery in this cause.

II.

Did the Court below err in its rulings upon the admission of testimony?

The Cincinnati book being a record of arrivals, while the Dayton and Piqua books are records of clearances, different questions present themselves as to each, which we will examine in their order. But as it is contended that these are public records, and as such have superior value, as well as freedom from the ordinary

conditions of admissibility of private books of entries, we say:

1. *These are not public records, but stand on a level with the books of a merchant or of a private corporation.*

The canals of Ohio, since 1861, have been in the possession of an association of individuals, as lessees of the state, under the provisions of the act of May 8, 1861 (Swan & Sayler's Supplement, 61), "to provide for leasing the public works of the state." The lease for ten years, therein provided for, has by a joint resolution, passed April 11, 1867, been extended for ten years longer, and will not expire before 1881. Section 7 of the act of 1861 provides that the lease shall vest in the lessees for the term—

> "Such rights, privileges, and franchises now exercised by the state, as may be necessary to manage, control, and keep in repair the public works, and collect tolls for the navigation of the same, together with the right to appoint superintendents, collectors," etc., who "shall have and exercise the same power and authority in the collection of tolls and water-rents, and the levy of fines, as can now by law be exercised by similar officers and agents appointed by the state, and said lessee or lessees shall be governed by the rules and regulations for navigating the canals now in force, subject to such alterations and additions as may hereafter be established by law," etc.

Whatever powers are exercised under this act are for exclusively private ends. And even if the law had not limited the franchises granted to "such as may be necessary," the fact that the use is now private renders

the books private books. If the charter of a bank require it to keep true books of accounts always open to the stockholders and the state, do the entries thereby acquire the force of public records, as against third persons, not stockholders? The Lake Shore and Michigan Southern Railroad Company is a corporation, partly organized under the laws of this state, of much greater value to the commerce of Ohio than the canals of Ohio. If a provision had been inserted in its charter, requiring it to keep books of record of the movement of property on its line, would these entries be public records? The ordinary entries on the books of the Pennsylvania Railroad Company have no greater value as evidence against third persons than those of any other private corporation, or of any merchant. Did the entries, made while that great corporation was possessed of the Pennsylvania canals, which it purchased from the state, of transactions upon those canals, possess a higher value, or import a verity which the ordinary railroad entries did not have?

2. *If the canals had been within the control of the state, it would not follow that the books were competent.*

The canal-boat captains who signed the Dayton and Piqua certificates were not public officers. The law, as we shall show hereafter, does not provide for certificates of arrivals, such as Collector Messerole kept, and the Dayton and Piqua collectors, who were required to prepare the certificates from the bills of lading, did

not know the truth of the facts they wrote. Like the registry of a ship, the entries are not of the nature of public registers, "not being of any transaction of which the public officer who makes the entry is conusant." 1 Greenl. on Ev., sec. 494.

In *United States* v. *Brune*, 2 Wallace Jr., 264, Mr. Justice Grier says that the registry of a ship is

> "Not even *prima facie* evidence of ownership in a criminal prosecution like this, nor would common reputation be. You must show the fact of ownership, as you generally show other facts, proving it by witnesses whom the defendant may cross-examine."

And the object of keeping the books is merely to insure the full and sure collection of tolls. The place whence the cargo comes is not required to be noted, nor the port whither it is bound. The law requiring the certificates to be kept is contained in sections 107, *et seq.* (1 Swan and Critchfield's Statutes, 217), of the act passed March 28, 1840, "to provide for the protection of the canals of the State of Ohio, the regulation of the navigation thereof, and for the collection of tolls."

These sections are as follows:

> SEC. CVII. It shall be the duty of every collector to whom bills of lading are required to be presented, in order to obtain a clearance for any voyage agreeably to the seventy-fifth, seventy-sixth, seventy-seventh, and seventy-eighth sections of this act, to make out from such bill or bills of lading, in a book to be provided by him for that purpose, a certificate, containing a perti-

nent description of the articles composing the cargo of the boat or float, or composing such float, for which clearance is about to be issued, properly classified and designated with reference to the rates and amount of tolls chargeable thereon; which certificate shall be signed by the master of such boat or float, who shall also attest on oath or affirmation to the correctness thereof, if required by the collector, before the clearance for such boat or float shall be issued.

SEC. CVIII. In case any property not contained in the certificate prescribed in the preceding section, shall be received on board of any boat after said boat shall have proceeded one mile from any collector's office, the collector whose office shall be next in order in the course of the voyage, to the place where such property was received on board, shall make out a certificate of all such property, in a book to be provided by him for that purpose, conformably to the requisitions of the preceding section, which shall be signed, and, if the collector shall require, be attested by the master of such boat or float, on oath or affirmation.

SEC. CX. In every case where a certificate is required to be made out and signed, agreeably to the provisions of the one hundred and fifth (one hundred and seventh) and one hundred and sixth (one hundred and eighth) sections of this act, the collector shall enter upon the clearance a correct list or statement of all articles of lading contained in such certificate, properly classified and designated, with the amount of tolls charged and received thereon, and shall sign his name thereto.

SEC. CXI. On the arrival of any boat or float at the place of destination, or at any place in the course of the voyage where there is a collector's office, if in the day-time, the master thereof shall immediately present to the collector the bill or bills of lading, as required by the seventy-sixth (seventy-eighth), seventy-seventh (seventy-ninth), and seventy-eighth (eightieth) sections of this act (together with the clearance and list of passengers; and if such boat or float shall arrive in the night-time, the same shall be presented between the time of arrival and one hour after sunrise).

Error in Admission of Testimony.

SEC. CXII. No boat or float shall proceed on its voyage until the bill or bills of articles of lading on board thereof, or composing such float, together with the clearance and list of passengers, shall have been presented to the collector, as provided in the preceding section; nor until all necessary examinations and comparisons of such bills of lading, clearance, and cargo, shall have been made, nor until all tolls chargeable on such boat, float, or cargo, payable at such office, shall have been paid, and the necessary certificate of an additional cargo, if any, shall have been signed, and if required by the collector, attested on oath or affirmation; and the collector may detain both the bills of lading and clearance, until the necessary entries shall be made on such clearance, and until all the requisitions of this section shall be complied with.

SEC. CXIV. No part of the cargo of any boat or float, nor any article composing such float or any part thereof, shall be unladen, landed, or removed from the canal, at the termination of any voyage on such canal, nor at any place on the canal within one mile of a collector's office, until the clearance together with the bill or bills of lading, of the whole cargo of such boat or float, shall have been presented to the proper collector, and a permit obtained from such collector for such unlading, landing, or removal; which permit such collector is hereby required to grant, after a reasonable time shall have elapsed for the examination of such clearance, bills of lading and cargo, and on the payment of all tolls which shall remain due; and for every violation of the provisions of this section, the master of such boat or float shall forfeit and pay the sum of ten dollars, and also double the amount of tolls chargeable on the article or articles so unlawfully landed, removed, or unladen: *Provided*, that in all cases where any boat shall be in a leaky condition, or from any other cause, goods or property on board any such boat shall be in danger of damage or perishing by delay, and the proper collector can not be found, such goods or property may be landed or secured until such collector may be found, and a permit obtained for the further removal of the same.

The sections, requiring clearances and bills of lading, are the following:

SEC. LXXIII. No boat or float shall be permitted to pass on either of the canals, unless the master thereof shall have first obtained a clearance therefor, for each voyage of such boat or float, from the proper collector of tolls on such canals, except in the cases hereinafter particularly specified.

SEC. LXXIV. Clearances for every voyage shall be required of, and issued by the collector, whose office shall be kept nearest to the place at which the voyage shall be commenced, provided that there be any collector's office within one mile of such place.

SEC. LXXV. If there be no collector's office within one mile of the place from whence the voyage is commenced, the clearance for such voyage shall be required of the collector at whose office the boat shall first arrive in the course of the voyage, and such boat shall be permitted to proceed from the place where the voyage was commenced to such collector's office, and no further without a clearance.

SEC. LXXVI. The full amount of tolls chargeable on any boat and on each and every article of property which shall be on board thereof, or constitute any float, at the time such boat or float shall depart from the port or place in which there is a collector from whom a clearance is required, or that shall be taken on board within one mile of such port or place, shall be paid to such collector before he shall issue a clearance for such boat or float.

SEC. LXXVII. Every master of a boat or float, conveying property on either of the canals, shall exhibit to the several collectors hereinafter mentioned, a just and true account, or bill of lading of such property, signed by the consignor thereof, and containing, first, the name of each place on the canal where any portion of such property was shipped, and the place for which it is intended to be cleared, specifying the portion shipped at each of such places, and the portion intended to be cleared to each

place; second, a statement of the weight of all articles of such property on which toll is to be charged by weight, of the number of articles on which toll is to be charged by number, and of the feet of each article on which toll is to be charged by the foot; third, a specification of the weight or quantity of each article or articles on which one rate of toll is to be charged, and which is to be transported to one place, separately from other articles on which a different rate of toll is charged, or which is to be transported to a different place.

SEC. LXXVIII. Every such account or bill of lading shall be exhibited: First, to every collector of whom a clearance shall be required; second, to every collector whose office shall be next in order in the course of the voyage to the place where the clearance shall have been granted; third, to every collector at a place where any portion of the cargo shall be unladen or any additional cargo received, and if there be no collector at such place, to the collector whose office shall be next in order in the course of the voyage; fourth, to every other collector who shall demand such account or bill of lading to be exhibited.

SEC. LXXIX. If any property shall be received on board of any boat or other float, for the purpose of being transported on either of the canals, during any voyage after such boat or float shall have proceeded one mile from the place at which a clearance for the voyage was granted, an account or bill of lading thereof, conforming to all the requisitions hereinbefore stated, shall be exhibited to the collector whose office shall be next in order in the course of the voyage to the place where such property was received on board, to whom the full amount of tolls chargeable on such property shall be paid, and such boat or float shall not be permitted to proceed on such voyage beyond the office at which the tolls on such property, so received on board, are payable, until the full amount of such tolls are paid.

SEC. LXXX. When any cargo shall be taken on board of any boat or float, after such boat or float shall have left the place where a clearance was granted, as specified in the preceding section, the account or bill of lading of such property shall be exhibited to the collector whose office shall be next in

order in the course of the voyage to the office at which the tolls on such additional cargo are required to be paid, and to every other collector who shall demand it to be exhibited.

SEC. LXXXI. If there be no collector's office within one mile of the place where a voyage on the canal shall be commenced, nor within one mile of the place where the same shall terminate, nor at any intermediate place, the master of the boat or other float shall, within ten days after the termination of such voyage, exhibit a true account thereof, or bill of the lading transported on board of such boat or float, at any time during such voyage, to the collector whose office shall be nearest to the place where such voyage terminated, and shall pay to such collector the tolls due on such boat or float and lading, and every master who shall neglect to exhibit such account and bill, and to pay such tolls, within the period above limited, shall, for every such offense, forfeit the sum of twenty-five dollars.

SEC. LXXXII. Every master of a boat or other float navigating either of the canals, who shall omit to exhibit or deliver a true bill of lading to any collector, or to pay the tolls thereon when required, or shall deliver any article mentioned in a bill of lading at a place beyond that to which such article shall have been cleared, shall forfeit the sum of twenty-five dollars.

SEC. LXXXIII. Every person who shall sign or deliver to any collector a false bill of lading, shall pay, on all property omitted in such false bill, treble the established rates of toll chargeable thereon, to any collector who shall be satisfied of such omission, for the whole distance such property is conveyed on the canal.

SEC. LXXXIV. Every person who shall knowingly sign or deliver a false bill of lading, shall be deemed guilty of a misdemeanor, and upon conviction thereof, before any court of competent jurisdiction, shall be fined not less than three times the value of the property omitted or falsely stated in such bill.

SEC. LXXXV. Every collector receiving a bill of lading

may require the master exhibiting it to verify it by his oath, which such collector is authorized to administer.

SEC. LXXXVII. If, on unloading any boat or float, it shall be discovered that the cargo, in consequence of an unintentional error, exceeds the quantity stated in the bill or bills of lading, it shall be the duty of the master of such boat or float immediately to report such overplus, and pay the lawful tolls thereon, to the collector at the place where such error may be discovered, if there be any collector at such place; and if there be no collector at such place, to the next collector, at or near whose office the boat shall arrive, after the discovery of such error is made; and any master of a boat or float, who shall fail to comply with the requisitions of this section, shall forfeit and pay the sum of ten dollars, besides double tolls on all property omitted in the bill or bills of lading.

SEC. LXXXVIII. Each boat navigating the canals shall have a separate clearance, and no part of the cargo of any boat shall be cleared to a place beyond that to which the boat is cleared.

SEC. LXXXIX. No boat or other float shall proceed beyond the place to which it shall be cleared, nor shall any article of its cargo be unladen after its arrival at the place for which such article is cleared, nor proceed beyond such place, until the master thereof shall have delivered the clearance of such boat or float to the collector at the place for which it is cleared, if there be any collector at such place.

SEC. XC. If there be no collector at such place, the master shall deliver the clearance to the last collector whose office shall be passed by the boat, in the order of the voyage, and shall receive a permit from such collector to proceed to the place to which the boat or float is cleared.

SEC. XCIV. Whenever a difference shall arise between a collector and the master of any boat, or float as to the amount of tolls chargeable on the lading of such boat or float, the collector shall detain the boat or float, and the articles on which toll is to be charged, and shall weigh, count, or measure the articles, as the case may require; and if it shall be ascertained

that the weight, number, or feet exceeds the amount stated in the bill of lading thereof, the collector shall charge tolls according to the weight, number, or feet thus found; and the master shall pay to the collector the expense of such weighing, counting, or measuring; and such expense shall be chargeable on such articles, and on the boat or float containing them.

SEC. XCVIII. Every master of a boat or float, shall make out, for every voyage, a correct list of all passengers over twelve years of age, that may have been transported on board of said boat or float for the distance of one mile or upwards; which list shall, in all cases, exhibit distinctly and legibly written with ink, in separate columns, to be provided for that purpose, first, the name of each passenger on board of the boat at the time of the arrival thereof at any place where there is a collector's office, or who shall have been transported on board thereof during the voyage; second, the name of the place, or the distance from some place of notoriety on the canal where such passenger came on board; third, the place to which such person may have taken passage; fourth, the place where such passage actually ended, if at a place different from that to which passage was taken; which list shall, in all cases, be attached to the clearance of the boat, and, with the clearance, to be delivered to the collector to whom the clearance is required to be delivered, whose duty it shall be to examine said list, and see that all the passengers are correctly entered on the same.

SEC. XCIX. It shall be duty of every collector to whom any list of passengers is required to be delivered, at or near the termination of any voyage on the canal, to administer an oath or affirmation to the master of the boat, as to the correctness of any such list, which oath or affirmation shall also be attached to such list, and be subscribed by the master of the boat, who shall immediately pay to such collector the amount of tolls due on said passengers.

SEC. CIV. All tolls chargeable on any boat or float for any voyage about to be made on either of the canals of this state, shall be paid to the collector (who is required to issue a clearance for such voyage) before such clearance shall be

issued; and no collector shall be required to issue a new clearance for any boat, till all arrearages of tolls chargeable on such boat shall be paid.

SEC. CVI. In all cases where a boat or float shall commence a voyage at any place more than one mile distant from any collector's office, and which voyage shall terminate at any place at which, or within a mile of which there is a collector's office, all tolls chargeable on such boat, float, and cargo on board thereof, shall be paid to the collector at or near whose office such voyage terminates; and a permit shall be obtained from such collector for unlading, before any part of the cargo of such boat or float, or any article composing such float, shall be unladen, landed, or removed from the canals, and for every violation of any of the provisions of this section, the master of such boat or float shall forfeit and pay the sum of ten dollars, and also double tolls on every article so unlawfully landed, removed, or unladen; for the payment of which penalties and tolls, such articles, and also every owner or part owner of any such boat, float, or article shall be liable.

SEC. CXV. In any case where any boat or float shall navigate, or attempt to navigate, on either of the canals of this state without being legally authorized so to do, it shall be the duty of every lock-tender, superintendent, or other authorized agent of the state, on being notified thereof, to stop and detain such boat or float, until the same shall be legally authorized to proceed.

SEC. CXVI. For the purpose of ascertaining whether any boat or float which shall be found navigating on a canal of this state is authorized so to do, it shall be the duty of the master thereof to exhibit to the lock-tender at the first lock at which such boat or float shall arrive, after having departed from or passed by any place at which there is a collector's office, the clearance of such boat or float; and if there be no lock-tender at such lock, then the same shall be exhibited to the first lock-tender or superintendent, who shall be passed in the order of the voyage from such collector's office, and who shall be demand to see such clearance; and if the clearance shall not be so

exhibited, such lock-tender or superintendent shall stop such boat or float from proceeding further on the canal, until the same shall be legally authorized so to do.

SEC. CXXII. The collectors of tolls shall keep accounts of all tolls received by them, in such form as shall be prescribed, from time to time, by the auditor of state, and shall deposit the original books of accounts, together with such clearances and other papers as he shall require, in the auditor's office, on or before the 10th day of December in each year.

SEC. CXXIII. Each collector shall make abstracts from such books, showing the amount of tolls received by him each day, and transmit the same by mail to the auditor, *once in each month*, and as often as the auditor shall require, if he shall think proper to require such abstracts more frequently than once *in each month*.

Tedious as the perusal of these sections must have been to the Court, it was in the highest degree important to us, for a careful inspection of them resolves many of the supposed difficulties in the case. Thus, section 107, by specifying the required contents of the certificates, viz., a pertinent description of the articles composing the cargo "properly classified and designated, *with reference to the rate and amount of tolls chargeable thereon*," shows that the state does not care to keep a record of the movement of property on its canals, other than may be necessary to secure its revenues. No account is kept of such movement, but strict accounts of tolls received are required. (Sections 122 and 123.)

3. *The certificates in the Cincinnati book were not competent.*

Section 107 requires such books to be kept, but it applies only to collectors "to whom bills of lading are required to be presented *in order to obtain a clearance*," and the certificate is by this section required to be "signed by the master of such boat," before the clearance shall be issued. See also sections 108 and 109. Sections 74 and 75 specify that the clearances shall be issued by the nearest collector, which in this case was Brown, at Dayton, for boats coming south, and Carson, at Piqua, for boats going north. The Cincinnati book was offered for the purpose of showing what quantity of whisky *arrived* at Cincinnati. If Mr. Messerole, the Cincinnati collector, had no authority to keep such a book of entries for cargoes arriving, then his entries were not made in the usual and ordinary course of business, and were inadmissible. *Chambers* v. *Bernasconi*, 1 Cr. Mees. & Rosc. 347; *Stapylton* v. *Clough*, 2 Ellis & Bl. 933.

We can not, after much examination, discover that Messerole had such authority. The purpose of the sections of the canal law upon the subject seems to have been to secure the payment of tolls, and to provide checks upon masters of boats and collectors, and by no means to furnish a record of the arrival of freight. Thus, we have already shown that the certificate is required only by sections 107 and 108, and that it is to be made when a clearance is procured. It must specify the prop-

erty on board for which clearance is sought, classified with reference to rates of toll. So also must the clearance, section 110. Section 104 requires the tolls to be paid before the clearance is issued. Section 114 requires the clearance and bills of lading to be presented to the collector at the port of destination and a permit for unloading obtained before removing any of the cargo. No record of such presentation of clearances and bills of lading or permits is required. Accounts, on the contrary, are required of all tolls received. Section 122; also section 123.

It follows that the Cincinnati book was kept without authority of law, and not in the usual and ordinary course of business, and should have been rejected on that ground.

But again, the certificates in the Cincinnati book, being all unsigned, are the entries or declarations of Messerole alone, and not of the captains, and the proof did not show that Messerole had competent personal knowledge of the contents of the several canal-boats. If he had, he might have testified from memory, or might have refreshed his memory by the certificates, in either of which cases the value of the testimony would have depended upon the confidence reposed in his veracity or strength of memory. But we are at a loss to see how the book could become original testimony at all, not being kept by requirement of law. 1 Greenl. on Ev., sec. 437.

It is claimed, however, that it was the duty of the canal-boat captains to give the collector at the port of

destination an account of their cargoes; that this account was a verbal fact, the truth whereof they knew; that in the course of business they stated it, having no motive for falsification; that Messerole actually recorded it, or should be presumed to have done so, having no inducement to the contrary.

We reply, *first*, that the law did not provide for such record; *secondly*, that it did not require the captains to declare the contents of their boats, except by delivering their bills of lading and clearances to Messerole, and allowing him to examine their cargoes (sec. 114); and *thirdly*, we deny the proposition to be law, and affirm the contrary, claiming the rule to be well settled, that in no case is such *entry* to be received, unless made by one who had knowledge.

It will not be denied that the admission of such entries in any case is an exception to the general rule, limiting testimony to that which is direct, and delivered under the sanction of an oath, in the presence of the party or his counsel, who have the opportunity of cross-examination. This species of hearsay is, however, admitted from necessity, but the rule does not extend beyond the necessity. Men who do not trust their memories, but, on the contrary, make record of their transactions, are, if the record be contemporaneous with the event sought to be proved, and made in the usual course of business by those who know the truth of the fact recorded, allowed to prove the fact by the record, being themselves also called if living and accessible,

or if dead, the record permitted to speak alone. The necessity grows, not out of the extension of the custom of making such records by those ignorant of their truth, but out of the fact that commerce, and the more extensive the greater the necessity, requires the preservation of facts by book-keepers or others, in entries of the kind under discussion, of a character, or to an extent beyond the power of memory to preserve. Therefore, the book, which can preserve, is substituted for the memory, which may not remember.

Whatever may be said of the necessity of producing the scribe who made the entry, or proving his death, it will not be denied that the text-books insist upon the rule as we state it, viz., that the record must have been made by one possessed of knowledge of the facts recorded. 1 Greenl. on Ev., secs. 115, 116; 1 Taylor on Ev., secs. 632, 638, 640.

Nor will it be denied that the English courts have shown a disinclination to extend the rule. Mr. Justice Blackstone speaks of it as a "dangerous species of evidence." (3 Black. Com. 368.) The danger of mistake also introduces a further element of doubt, where the record is by one of a statement made by another, unless verified by the oath of that other. *Brain* v. *Preece*, 11 Mees. & Wels. 773.

Nor will it be denied that nearly all the American cases from the leading case of *Welsh* v. *Barrett*, 15 Mass. 380, till now, have insisted upon the same re-

striction, and have not yet extended the rule, as is now sought to be done.

The exception is supposed to be shown by decisions of this Court, which Judge Emmons regarded as having revolutionized the law of evidence in this respect and extended the principle of admission so as to allow the entry by one, (himself ignorant of the truth,) of a verbal statement, made by one knowing its truth, to be received without calling the latter party to the stand. Thus, if I, in the regular course of duty or business, make a verbal statement which I know, or ought to know, to be true, and another, in the like regular course, make record of my statement without knowledge of any kind upon the subject, it is, if the rule now contended for be true, unnecessary to call me and give direct proof under oath, and afford to the antagonist the opportunity of sifting its truth by cross-examination; but my verbal statement may be repeated by one who heard it, or proved by the record made of it. The result of this rule, if established, is, that hearsay ceases to be such when it occurs in the course of business. As if a lie or mistake could not as well happen in the course of business as elsewhere.

But, as if contrived for the occasion, one of the very cases relied on by the learned judge, *Fennerstein's Champagne*, 3 Wall. 145, states the rule just as we contend for it. Judge Swayne says:

"The rule rests upon the consideration that the entry, other writing, or parol declaration of the author, was within his ordinary business. In most cases he must make the entry contemporaneously with the occurrence to which it relates. *In all, he has full knowledge*, no motive to falsehood, and there is the strongest improbability of untruth. Safer sanctions rarely surround the testimony of a witness examined under oath. *The rule is as firmly fixed as the more general rule to which it is an exception.*"

The case of *Beaver* v. *Taylor*, 1 Wall. 637, warrants no different conclusion. The receipts for taxes, *known to the officer signing them to be true*, were inclosed in letters, *the authors of which also knew the truth of the dates* at which they were written; the point to which they were offered being to prove such dates; also, certain book entries were admitted, *on proof of the death of the clerk who made them.* The case is consistent with the established rule. The tax-gatherer had *knowledge* of the payment, the letter-writer of the dates and contents of the letters, and the clerk of the entries.

Nor does the case of *Blackburn* v. *Crawfords*, 3 Wall. 175, countenance the theory of a change or revolution in the rule. It was a case, not of entries, but of pedigree, and holds (1), that the verbal statement of a sister of the pretended wife does not prove marriage as against the heirs of the supposed husband. This is because the hearsay does not come from a source interested to preserve the purity of the family blood, but rather from one interested to establish the particular fact in dispute; (2 that a baptismal register is com-

petent to prove the date and fact of baptism, no more, *for the very reason that only these are known to the officiating priest to be true.*

The Fennerstein case, already commented on, not only contains the passage quoted *supra*, but in its facts is consistent with the view of the rule for which we are contending. The letters, there introduced in evidence, were, as the report states, all written by large dealers in champagne, necessarily personally cognizant of the facts detailed in their correspondence.

There remains to be considered only the case of *Clicquot's Champagne*, 3 Wall. 114, in connection with the case of *Lush* v. *Druse*, 4 Wend. 313, on which it is founded. This case decides: 1. That Jean Petit's statements to Farwell were competent, *because Petit was Clicquot's agent, and the statements were made in the course of his duty as agent.* This is the only reason given for receiving them, and we cannot suppose that if Judge Swayne had recognized any other, he would have omitted all mention of it, and taken so much pains to state this reason. For if a verbal statement made in the course of duty may be testified to by another who overhears it, a much shorter and simpler ground was furnished upon which to rest the admission of Farwell's repetition of Petit's statements, and Judge Swayne need not have taken so much trouble to prove that if the proof of Petit's agency for Clicquot had not been sufficient, there should have been an exception on that very ground. 2. That the prices current of other champagne dealers were competent.

But these, of course, were made by persons personally cognizant of their truth. 3. That Farwell might testify to what he had learned, during three months' residence in Paris, as to the market price of champagne, by inquiry of dealers.

As the last proposition is not confined to statements made in the course of business, it is obvious that it either stands upon a ground so broad as to admit any hearsay, or must be distinguished in some other way. So in the case in 4 Wendell, the witness was allowed to prove prices by what he learned from entries on the books of dealers (the books themselves not being produced), and from inquiries addressed to dealers. Either these cases were not decided correctly (which we do not believe), or they stand upon a very different basis from that now under consideration. For the answers to the inquiries were not given in the course of business or duty at all, but were replies to a detective, to a witness *in spe*, prospecting for testimony.

The error, into which the learned circuit judge has fallen, consists in overlooking the subject-matter with which this Court was engaged in these cases. These were decisions as to the competency of evidence upon questions of market value. The syllabus in either the *Clicquot* or *Fennerstein* case, attentively read, would have corrected his error, or at least should have raised a doubt in his mind whether he had not entirely misinterpreted Judge Swayne and this Court. Either Judge Emmons is mis-

taken, or Mr. Wallace greatly erred in his understanding of these decisions.

Thus, in the case of *Clicquot's Champagne*, the fourth item of the *syllabus*, which alone bears upon the question under consideration, is:

"4. Prices-current obtained from the agent of a manufacturer, or from dealers in the manufactured articles generally, and which have been prepared and used by the parties furnishing them in the ordinary course of their business, are so far evidence of the value of the articles mentioned in them, as that they may be submitted to the jury as 'throwing light' on the matter; as 'some guides to candid men,' and for their 'consideration.' And this rule was held to apply so far as that the *comparative* value, at the town of manufacture (Rheims), and at the capital of the country (Paris), of champagne wines made by one manufacturer (Clicquot), was allowed to be shown by the prices-current giving the value of that made by others (Mumm, Moet & Chandon); it not appearing, either by evidence in the case set forth in the bill of exceptions, or by an admission of the judge upon the bill, that such evidence was given, but that the articles were the same in price, kind, and quality."

In *Fennerstein's Champagne*, the *syllabus* is as follows:

"In order to show the actual market value of articles of merchandise at a particular place in a foreign country, letters by third parties abroad to other third parties, offering to sell at such rates—if written in the ordinary course of the business of the party writing them, and contemporaneously with the transaction which is the subject of the suit—are admissible as evidence, even though neither the writers nor the recipients of the letters are in any way connected with the subject of the suit, and though there is no proof that the writers of the letters are dead."

These cases are easily sustained on the ground that the subject of the inquiries was a matter of hearsay, or at least of opinion. Market value can never be proved by single transactions, nor by repetitions of single transactions. Market value is matter of opinion, based on transactions of dealers, their estimates of worth, and the exchange of opinion among them. Call a dealer as a witness, and ask after a single sale:—an objection rightly lies to this course of procedure. For the sale may have been exceptional—at a sacrifice, or above the market. But the *market* is made by no one man, nor by any one man's dealings; it is the result of the dealings of all the traders in the article, learned by each from the others in conversation or by observation. Hence a dealer who has had no transactions of his *own*, may testify to market value. It is no extension of this principle, to allow, as in these cases, an opinion to be given, and the sources of that opinion, viz., inquiries addressed to dealers, to be stated. (In *Kerr* v. *McGuire*, 28 N. Y. 446, the witness had never heard or seen a transaction.) But this is certainly not on the general ground that a verbal statement, even if made in the course of business or duty, overheard or committed to writing by another, may be given in evidence by the latter: for, *first*, the verbal inquiries and answers in the cases in 4 Wendell and 3 Wallace were not in the course of business or duty; and *secondly*, Judge Swayne, who decided the Clicquot case, at the same term, in the Fen-

nerstein case, required the entry itself to have been made by one knowing its truth.

The reasons for the admission of such testimony upon questions of market value are thus given, by Judge Cooley, in *Sisson* v. *Cleveland and Toledo Railroad Co.*, 14 Mich. 497, a case in which newspaper reports of the markets were admitted in evidence:

> "The principle which supports these cases will allow the market reports of such newspapers as the commercial world rely upon to be given in evidence. As a matter of fact, such reports, which are based upon a general survey of the whole market, and are constantly received and acted upon by dealers, are far more satisfactory and reliable than individual entries or individual sales or inquiries; and courts would justly be subject to ridicule, if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon, and demand evidence of a less certain and satisfactory character."

The cases which hold that proof of *value* is matter of opinion, and received in analogy to the testimony of experts, without reference to actual sales, are very numerous. Some of them are the following:

Vandine v. *Burpee et al.*, 13 Met. 291; *Wyman* v. *Lexington, etc., Railroad Co.*, Ib. 326; *Walker* v. *Boston*, 8 Cush. 279; *Shaw* v. *Charlestown*, 2 Gray, 109; *Russell* v. *Horn Pond Branch Railroad*, 4 Ib. 607; *Haskins* v. *Hamilton Ins. Co.*, 5 Ib. 432; *Dickenson et al.* v. *Fitchburg*, 13 Ib. 546; *Fowler* v. *Commissioners of Middlesex*, 6 Allen, 92; *Whitman et al.* v. *Boston and Maine R. R.*, 7 Ib. 313; *Brill and Brill* v. *Flagler*, 23 Wend. 354; *Lincoln* v. *Saratoga, etc., Railroad*, Ib. 433;

Joy v. *Hopkins*, 5 Denio, 84; *Harris* v. *Panama Railroad*, 3 Bosw. 7; *Merrill* v. *Grinnell*, 30 New York, 594.

In this case, Denio, C. J., on page 613, says:

"The defendant's counsel excepts to the ruling of the referee by which Strachwitz was allowed to testify as to the value of the trunk from knowledge acquired since he came to this country, and to proof by him of the fact that he had made inquiries here as to the value of articles of that kind. Opinions of witnesses are received upon questions as to the value of chattels. The witness had been in this country five years at the time of the trial. I think he was competent to speak of the value of the trunk here, and that there was no error in allowing him to state the means of knowledge which he had acquired."

This statement of the rule casts light upon the case of *Lush* v. *Druse*, 4 Wend. 313, showing that in New York, where both cases were decided, and where no discrepancy between them seems to have been observed, the inquiries as to value are admitted, not as verbal facts occurring in the course of business, but as showing the sources of information of a witness allowed to express an opinion upon a question of value. *Kellogg* v. *Krauser*, 13 Serg. & R. 137; *Brown* v. *Corey & Patterson*, 43 Penn. St. 495.

On page 506, Judge Woodward, speaking of value, says:

"It belongs to that class of facts which exclude direct evidence to prove them, being such as are either necessarily or usually imperceptible by the senses, and therefore incapable of the ordinary means of proof."

Crouse v. *Holman*, 19 Ind. 30; *Ohio and Miss. R. R. Co.* v. *Irvin*, 27 Ill. 178; *Same* v. *Taylor*, Ib. 207; *Derby* v. *Gallup*, 5 Minn. 119; *Dalzell* v. *Davenport*, 12 Iowa, 437; *Hood* v. *Maxwell*, 1 W. Va. 219.

That the witness called to prove value need not have had any transactions himself is shown by the case of *Kerr, Adm'r*, v. *McGuire*, 28 N. Y. 446, 451, where one who had acted as book-keeper in breweries for several years was allowed to prove the market value of beer and ale, although, as stated by Mr. Warren, *arguendo*, on page 447, he "never bought or sold any ale or beer, and never saw any bought or sold."

But by far the best statement we have been able to find, of the reasons for making proof of market value an exception to the rule excluding hearsay, is made by Judge Story, in *Alfonso* v. *United States*, 2 Story, 426, in these words:

"The first exception is to the admission of the evidence of the appraisers, and of merchants in Boston engaged in the importation and sale of sugars, as to the market price thereof at the port of export. The objection seems to be founded upon this: that it is (1) not the best evidence that the nature of the case admits of; (2) that it is mere hearsay. But it appears to me, that the objection is not supportable upon either ground. In the first place, the market value is necessarily a matter of opinion, as well as of fact, or rather of opinion gathered from facts. How are we to arrive at it? Certainly not by the mere purchase made by a single person, or by purchases made by a few persons; for in either case, they may have purchased above or below the market price, or the market price may be fluctuating, and the sales too few to justify any general conclusion. Buyers

may refuse to buy at a particular price; sellers may refuse to sell at a lower price. In this state of things, we must necessarily resort to opinions of merchants and others, conversant in trade, for their opinions, what, under all the circumstances, is the fair market price or value of the goods. The market price or value, therefore, must, in most cases, if not in all, be a matter of fact mixed up with opinion, for it must necessarily include a general price or value in the market, deducible from various averages, and approximations, and the different qualities of the same class of goods. In the next place, the knowledge of the market price being thus, at least in part, a matter of skill, judgment, and opinion, it is in no just sense mere hearsay; but it is in the nature of the evidence of experts. If the evidence of merchants at the port of export might be taken in the case, because of their actual experience and information, that of merchants and appraisers, having equal means of knowledge or information from their actual trade and business, would be equally evidence. Each is evidence in the same degree, and not the one secondary to the other, even if each were not intrinsically of equal value under all circumstances. Indeed, I can conceive of cases where the evidence of Boston appraisers, or Boston merchants, might be of higher value, in the estimate of a jury, than that of any foreign merchants at the port of export, from the nature or importance of the case, or different interests of the witnesses. This objection, therefore, is not sustainable."

Considered in the light of this exposition by Judge Story, it seems plain enough that to deny access to price-currents, printed market reports, or the books of dealers, in considering questions of market value, would be about as sensible as to refuse to a physician upon the stand, in a case of malpractice, liberty to refer to the standard works in current use in his profession, or to an engineer permission to consult his authorities.

How clear also it now appears, that the questions involved in this case are not affected by the decisions in 4 Wendell and 3 Wallace. Whether H. D. Chaffee & Co. had ever been possessed of whisky with the purpose to avoid payment of taxes, is a question of fact, not opinion. How false would be Judge Woodward's reason for admitting opinions upon questions of value, if applied to the matter in issue here, viz: how much whisky H. D. Chaffee & Co. shipped from Tippecanoe between October, 1865, and September, 1866. Is this a subject which

> "Belongs to that class of facts which exclude direct evidence to prove them, being such as are either necessarily or usually imperceptible by the senses, and therefore incapable of the ordinary means of proof?"

A little reflection will show how unwise would be the revolution Judge Emmons thinks has been made. A. is called as a witness, or gives his deposition in the case of the United States against B.; A. dies, and then his deposition, or proof of what he testified orally, is offered in the case of the United States against C. Would it be received? A. spoke in the course of duty and under oath; but the parties were not the same—C. was absent, and had no opportunity for cross-examination. Therefore, though A. is dead, the government loses the benefit of his testimony.

So also in the case of the enrollment of a vessel or steamboat. It is his act who did it, not that of any other owner.

True, it was done in the course of duty, was recorded by a public officer of the United States, is a matter of public record as much as, or more than these canal-books. And yet it is well settled that this act, this enrollment, is only evidence of ownership against him who made it, and as against his co-owners or others is utterly incompetent. This is fully shown by the collation of cases on the subject in the note to 1 Parsons on Maritime Law, 40. See also 1 Greenl. on Evidence, sec. 494.

For these reasons we insist that no part of the Cincinnati book was competent.

4. *The certificates in the Dayton and Piqua books were also incompetent.*

These were books, containing certificates made usually from bills of lading, though sometimes from statements of captains, by the collectors, who had themselves no personal knowledge of their truth. They were all, however, signed by the captains. These certificates were made when the clearances were procured, and in strict accordance (except that the collectors did not always see the bills of lading) with section 107 of the Ohio canal laws.

To all these, and to each of them, we objected, because they were merely hearsay and *res inter alios actæ*.

First, they were usually made from the bills of lading—the law (section 107) requiring them to be thus made. Brown and Carson swear that they had no knowl-

edge of the contents of the canal-boats, other than from the bills of lading or the statements of captains.

They were, therefore, *secondary* evidence. The bills of lading from which they were made were the *primary* sources of knowledge. But the government did not even try to procure the bills of lading. No notice was given the defendants to produce them. No foundation was laid for the introduction of secondary evidence in the case.

But again, considered as entries, they were not competent as the declarations of *collectors*, for they had no knowledge on the subject whatever—they merely prepared the records from an examination of the bills of lading. The argument already made applies to these certificates treated as the evidence of the collectors.

Nor were they competent as the certificates of the *captains:—first*, because the law required them to be made out from the bills of lading, and if considered as the declarations of the captains, they were therefore necessarily confined to the sources of information indicated by section 107—that is to say, they were declarations by the captains of the contents of the bills of lading, and obnoxious to the objection that they were but *secondary*, the bills of lading being the *primary* evidence; *secondly*, because the certificates, considered as entries or declarations of the captains, were incompetent without proof of the death or non-accessibility of the captains, if they were not called.

It will not be claimed, we think, that any of these

certificates would be admitted in any English court; they do not come within the leading case of *Price* v. *Lord Torrington*, 1 Salkeld, 285, 1 Smith's Leading Cases, 390, nor any of the later cases. In that case Lord Holt admitted the entries, being items of beer delivered, entered daily by a clerk in a book kept for the purpose, from accounts verbally given by the drayman, but the drayman set his hand to the entries, and *proof was given of the drayman's handwriting and his death.*

In *Chambers* v. *Bernasconi*, 1 Cr. M. & R. 347, Lord Denman states the conditions necessary to the reception of such entries thus:

"An entry written by a *person deceased*, in the course of his duty, when he had no interest in stating an untruth, is to be received as proof of the fact stated in the entry, and of every circumstance therein described, which would naturally accompany the fact itself;" and adds, "*All* the terms of the legal proposition above are *manifestly essential* to render the certificate admissible."

And although the reasons for the extension or liberal construction of the rule are as great, if not greater, in Great Britain and her colonies than here, it can not be denied that the English courts deem such extension unwise. Hence in *Brain* v. *Preece*, 11 M. & W. 773, the Court of Exchequer refused to permit a second-hand entry, or one not made by a person having knowledge of its truth, to be admitted in evidence, Lord Abinger saying: "It is better to adhere to that case," (*Price* v. *Lord Torrington*,) "and not to give any exten-

sion to it." In the same spirit, Chief Justice Gibson, in *Crouse* v. *Miller*, 10 Serg. & R. 158, says:

> "Books of account are at best a dangerous kind of evidence. They are admissible on grounds of necessity, not of convenience, and the decisions in their favor have already gone as far as expediency can require or prudence justify."

Nor is there any conflict among the American authorities, unless introduced by the case of *Fennerstein's Champagne*, 3 Wall. 145. They are reviewed in 5 Am. Law Reg., N. S. 467, and shown to concur in requiring the presence of the declarant, or proof of his death, or at least his inaccessibility. They are also collected in the note to *Price* v. *Lord Torrington*, 1 Smith's Lead. Cas. 390, Am. ed.

The subject was examined by this Court in *Nichols* v. *Webb*, 8 Wheat. 326. It was there held, Judge Story pronouncing the opinion, that *after the death of a notary public*, his records of protests are admissible upon *proof of his death and handwriting;* that even this is permitted by a modification of the rules of evidence, (which in general exclude hearsay,) founded on "general interest and convenience." He recognizes the danger of changing the rules of evidence, which, being "of great importance, can not be departed from without endangering private as well as public rights. Courts of law are therefore extremely cautious in the introduction of any new doctrines of evidence which trench upon old and established principles." And Chief Justice Marshall re-

peated his assent to this requirement of proof of death and handwriting, upon the circuit, in *Owen* v. *Adams*, 1 Brock. 72. In some of the American courts, the benefit of this rule has, however, been extended to cases where, though the declarant or person making the entry may be living, he is inaccessible, or beyond the jurisdiction of the Court. *Sterrett* v. *Bull*, 1 Binn. 234; *Crouse et al.* v. *Miller*, 10 Serg. & R. 155; *Philadelphia Bank* v. *Officer et al.*, 12 Ib. 52; *Farmers' Bank* v. *Whitehill*, 16 Ib. 90; *Alter* v. *Berghaus*, 8 Watts, 77; *Elms* v. *Chevis*, 2 McCord, 349; *Reynolds* v. *Manning*, 15 Md. 523.

So also if he has become insane. *Union Bank* v. *Knapp*, 3 Pick. 36; *Holbrook* v. *Gray*, 6 Cush. 216.

Was the case of *Fennerstein's Champagne* intended, or has it the effect, to dispense with calling the declarant, or proving his death or inaccessibility and handwriting, in cases like this now under consideration?

In the opinion as printed, no allusion is made to *Nichols* v. *Webb*, nor to *Beaver* v. *Taylor*, where the entries in the books of Taylor & Davis were admitted upon proof of the death of the clerk who made them, although the same learned justice decided *Beaver* v. *Taylor*. There were dissenting opinions from Justices Wayne, Clifford, and Davis. We invite attention, *first*, to the fact that the letters admitted in evidence were written in France, and *secondly*, to the character of the question, viz., of market value. It thus appears

that they were admissible upon two distinct grounds, neither of which is applicable to the case now under consideration.

A single sentence is relied on to prove that, in this case, this Court intended to establish a further and novel exception to the general rule, by admitting letters and entries without the production of the author, or proof of his death. The sentence, with its context, is this (it must be remembered, however, that this is said in a case in which the author of the letter had written in France):

> "We think the letters in question in this case were properly admitted. In reaching this conclusion, we do not go beyond the verge of the authorities to which we have referred. In some of those cases, the person claimed to be necessary as a witness was dead. *But that can make no difference in the result.*"

It is obvious that the Court did not intend to enlarge the rule of evidence applicable to cases of this kind: and no one would be more astonished at the suggestion that the Court were revolutionizing the law, than the learned author of the opinion. It was surely an unconscious revolution. For he says, "*we do not go beyond the verge of the authorities.*"

The "authorities" cited are the following: *Taylor et al.* v. *The United States*, 3 How. 210; *Doe dem. Patteshall* v. *Turford*, 3 Barn. & Ad. 890; *Stapylton* v. *Clough*, 2 Ellis & Blackb. 933; *Carroll* v. *Tyler*, 2 Harris & Gill, 56; *Sherman* v. *Crosby*, 11 Johns. 70; *Shearman et al.* v. *Akins*, 4 Pick. 283; *Holladay, Ex'r*, v. *Littlepage*,

2 Munf. 316; *Alston* v. *Taylor*, 1 Haywood, 395, note; *Prather* v. *Johnson*, 3 Harris & Johns. 487; 1 Greenl. on Ev., sec. 120.

We have examined these cases with care, and fail to find in them any reason for the extension of the rule to a case like this.

These cases divide themselves into two classes. In some, proof was in fact made of the death and handwriting of the clerk or person who made the entry. This is true of *Doe dem. Patteshall* v. *Turford*, *Stapylton* v. *Clough*, *Holladay* v. *Littlepage*, *Alston* v. *Taylor*, note.

In *Doe* v. *Turford*, it will be found that Campbell (afterward Lord C.) and Richards (afterward a Baron of the Court of Exchequer) especially relied in argument on the proof of death and handwriting; and in his opinion, Mr. Justice Taunton goes so far as to say:

"A minute in writing, like the present, made at the time when the fact it records took place, by a person *since deceased*, in the ordinary course of his business, *corroborated* by other circumstances, which render it probable that that fact occurred, is admissible in evidence. Those *corroborating* circumstances must be proved."

In *Stapylton* v. *Clough*, the entry was admitted upon proof of the handwriting and death, but a subsequent parol declaration qualifying the entry was rejected, because not made in the course of duty; but Wightman, J., says:

"A parol declaration of what has been done in the course of duty may be admissible *after the death of the party*."

And Lord Campbell, C. J., who, in the *Sussex Peerage case*, 11 Clark & Fin. 113, had argued in favor of the reception of parol declarations of deceased witnesses in like cases with written entries, adds, "This is not admissible, unless every declaration upon the subject of a memorandum, *made by a deceased person*, during the rest of his life, is admissible."

We may add that the subject of the reception of parol declarations was much considered in *Fursdon* v. *Clogg*, 10 M. & W. 571, where all the cases were cited by the late C. J. of the Common Pleas, Sir Thomas Erle, in argument against their admissibility, but the question was left undecided by the Court.

The other class of cases is well illustrated by *Holladay* v. *Littlepage*. The question was, whether John C. Littlepage had paid the passage of Lewis Littlepage to Europe; a witness testified that the captain of the vessel, in the owner's presence, told him so. The Court below refused to give an instruction that this testimony was inadmissible, "the captain being dead." The Court of Appeals held that—

"The acknowledgment in question having been made at, or about the time of the said testator's sailing for Europe, and being the admission of those who were competent to charge themselves with the receipt of the passage money by an ordinary receipt or acquittance, the Court is of opinion that the said testimony, on these grounds, and not on that assigned by the Court below, was properly received by the said Court."

In *Carroll, Ex'r*, v. *Tyler*, the question was as to

the compensation of an agent of an executrix. Certified copies of receipts, duly acknowledged and recorded according to law, coming from the proper probate office of the county where the estate was settled, given to the executrix by distributees, were admitted in evidence.

In *Sherman* v. *Crosby*, the point decided was:

"If A. authorize B. to settle a demand with C., and pay what is due, C.'s receipt is *prima facie* evidence of payment and the legality of the demand, and it lies with A. to show fraud in the adjustment, or the abuse of the discretion."

Shearman et al. v. *Akins* decides that receipts of persons not within the commonwealth are admissible, on proof of handwriting, as evidences of charges in a guardianship account, of payments made to such persons.

Prather v. *Johnson* decides that—

"If A., as surety for B., pays a debt due to C., on the proof of the payment, A. could recover of B. He could recover on C.'s saying A. had paid, and of course if C. wrote that A. had paid, surely it is evidence, whether the writing was in a book or letter."

In *Taylor et al.* v. *United States*, invoices and a letter were offered to negative a usage. The question was one of value or customary price, upon which, as we have shown, such proof is strictly proper. Some, at least, of the invoices, as well as the letter, were verified by a witness, and there is nothing to show what proof was given of the others. The objection was limited to the proposition that they were *res inter alios actæ*, and the

decision of Judge Story (who certainly showed no sign of desiring to take back what he had said in *Nichols* v. *Webb*) sustains their admission on the ground that it was a case of *usage*, in which, as a matter of course, *res inter alios* are necessary to be considered. Evidence of transactions between third parties is always competent to negative a usage: the very foundation of which is that there are no such transactions except according to the usage.

We have now examined all the cases cited, and certainly no one of them looks like sustaining the proposition, that, upon aqu estion how much, if any, whisky H. D. Chaffee & Co. shipped from Tippecanoe, declarations made by canal-boat captains at Piqua and Dayton, even if reduced to writing and signed, are admissible in the absence of the captains, or proof of their decease or non-accessibility, and handwriting. The straightforward and natural mode for the government to proceed, we submit, was to call the captains, put the certificates into their hands to refresh their memories, examine, and let the defendants cross-examine. Then the great danger that fraudulent certificates might be introduced in evidence would have been avoided. There were four distilleries on the canal between Dayton and Piqua. Nothing was more easy than for any of these distillers to report at the collector's office bills of lading from Tippecanoe. Indeed, bills of lading were not always called for by the collectors, but as is proved, they took the word of captains whom they knew. It was

said in argument, that this theory charged and required the conviction of each of the other four distillers. This is not so, but if it were, is it likely that if Messrs. Chaffee designed to defraud, they would take no pains to conceal it? The contrary theory assumes that no one of the other distilleries perpetrated any fraud, and that the defendants left the evidence of their own wrong so plain upon the collector's books, that any one could easily find its traces, and procure its detection:—and this with detectives watching every turn, and a moiety of the penalty for a reward. It may be said the defendants might have called the canal-boat captains. But the burden of proof was on the government, and how were the defendants to anticipate that the government would shrink from calling the witnesses of the fact, and resort to declarations and entries?

Let us now consider the statement in the text of Greenleaf on Evidence referred to, and the further authorities cited in the latest edition of that work, and see if any warrant is there found for the ruling made in the present case. The section (120) is as follows:

"Returning now to the admission of entries made by clerks and third persons, it may be remarked that in most, if not all of the reported cases, the clerk or person who made the entries was *dead;* and the entries were received upon proof of his handwriting. But it is conceived that the fact of his death is not material to the admissibility of this kind of evidence. There are two classes of admissible entries, between which there is a clear distinction, in regard to the principle on which they are received in evidence. The one class consists of entries

made against the interest of the party making them; and these derive their admissibility from this circumstance alone. It is, therefore, not material when they were made. The testimony of the party who made them would be the best evidence of the fact; but, if he is dead, the entry of the fact made by him in the ordinary course of his business, and against his interest, is received as secondary evidence in a controversy between third persons. The other class of entries consists of those which constitute parts of a chain or combination of transactions between the parties, the proof of one raising a presumption that another has taken place. Here, the value of the entry, as evidence, lies in this, that it was *contemporaneous with the principal fact done*, forming a link in the chain of events, and being *part of the res gestæ*. It is not merely the declaration of the party, but it is a verbal contemporaneous act, belonging, not necessarily, indeed, but ordinarily and naturally to the principal thing. It is on this ground that this latter class of entries is admitted; and therefore it can make no difference, as to their admissibility, whether the party who made them be living or dead, nor whether he was, or was not, interested in making them; his interest going only to affect the credibility or weight of the evidence when received."

The cases cited in Redfield's Greenleaf, sec. 120 (the latest edition), as sustaining the latter part of this section, are *Sherman* v. *Crosby*, *Holladay* v. *Littlepage*, *Prather* v. *Johnson*, *Shearman* v. *Akins*, and *Carroll* v. *Tyler* already considered, and in addition, *Cluggage* v. *Swan*, 4 Binn. 154, and *James* v. *Wharton*, 3 McLean, 492. Also, the learned author says, "This distinction was taken and clearly expounded by Mr. Justice Parke in *Doe dem. Patteshall* v. *Turford*, 3 B. & Ad. 890, cited and approved in *Poole* v. *Dicas*, 1 Bing. N. C. 654."

Upon these citations, we observe, *first*, that the

cases we have already commented on establish no rule applicable to this case. They resemble rather the case of *Beaver* v. *Taylor*, 1 Wall. 637, where tax receipts were admitted in evidence.

Secondly, in *Lessee of Cluggage* v. *Swan*, the Court held that—

> "The general rule is that payments made to any other person than the plaintiff in the suit must be proved by the oath of a witness. But as *exceptions to this rule*, payments for land to the officers of the land office may be proved by the officer's receipt, and payment of the fees and expenses of survey by the deputy surveyor's receipts."

That is to say, in accordance with the rule stated in *Holladay* v. *Littlepage*, in an action between two, involving the question of payment by one of them to a third person, an admission of such third person, which would be evidence against him, in an action for or against him, is admissible. Having given the receipt as evidence of payment, it would, if acted on by another, estop him. That other can not, therefore, object that it is not competent where he is concerned, for if he is compelled to act upon it, he will secure the benefit of the estoppel as fully as if he voluntarily changed his position in reliance upon it. The case of *James* v. *Wharton* is an ordinary case of entries, where it was held that "when the clerk is dead who made the entries in a book of accounts, his handwriting may be proved." *Thirdly*. We have already observed upon *Doe* v. *Turford*, that proof was there given of the death and handwriting of the attorney who had made the service. An exami-

nation of the opinion of Mr. Justice Parke (the late Lord Wensleydale) will show that it does not sustain the distinction made by Mr. Greenleaf to the extent of dispensing with the proof of death. The distinction he did make was between entries or declarations *against interest*, which, for that very reason, need not be contemporaneous with the fact they prove, and those, in the course of duty not against interest, which must be contemporaneous. This is clearly shown by *Poole* v. *Dicas*, where the evidence was admitted on proof of the death of the clerk and his handwriting, and where this distinction is made by Mr. Justice J. Allan Park. So also in *The Sussex Peerage Case*, 11 Clark & Finnelly, 113, Lord Campbell, in the House of Lords, on the authority of *Doe* v. *Turford*, divides such declarations into the same two classes—(1) declarations against interest; (2) those made in the ordinary course of business or duty; and does not allude to any distinction between them, dispensing with proof of death in the latter case.

If we might be permitted to attempt to state the distinction to which Mr. Justice Parke first called attention, in what seem to us to be more exact terms than those of the text-books, we should say that it is between cases of entries contemporaneous with the event they record and those non-contemporaneous. In the former class of cases, the entries are competent, whether against interest or not, if made in the regular course of business or duty, and sustained by the oath of the party who made them, or in case of his death, insanity, or

other inability to give testimony (perhaps even if he is merely out of the state), by proof of his handwriting. In the latter class, proof that the entries were against interest is also essential. The cases of market reports in newspapers, price-currents, letters, and inquiries as to market value stand upon quite different principles. The same is true of receipts acted on by another, or which if acted on will estop the receiptor. These are declarations against interest, but they are much more. They are facts which have a positive value, irrespective of the fact of payment, for even if there had been no payment, the delivery of the receipt purposely, would bind the receiptor. It is singular that if Mr. Greenleaf intended his section 120 to be understood as it is now claimed he did, he should not have observed, that in every case cited by him to the second class of entries, which he so carefully distinguishes from declarations against interest, proof was actually made of the death or inaccessibility of the declarant, or the declaration was one against interest.

There are a number of cases referred to by him in his note as contradicting the text; with these we have at present no concern, for the question is, do the cases which are cited in support of the text warrant its statements? Or rather, do they warrant the gloss now put upon its statements?

Thus, in *Doe* v. *Turford*, *Poole* v. *Dicas*, *Holladay* v. *Littlepage*, *Stapylton* v. *Clough*, *Alston* v. *Taylor* (note), and *James* v. *Wharton*, the declarant was dead, and in all

these cases, except *Holladay* v. *Littlepage*, which was a parol statement, proof of handwriting was given. In *Shearman* v. *Akins*, the party giving the receipt was out of the state. In *Holladay* v. *Littlepage*, *Carroll* v. *Tyler*, *Sherman* v. *Crosby*, *Shearman* v. *Akins*, *Prather* v. *Johnson*, and *Lessee of Cluggage* v. *Swan*, the declarations were against interest, and apparently contemporaneous with the event (payment) they record.

In the 115th section, Mr. Greenleaf contradicts section 120, if the latter be understood in the sense we are now considering; for there he says, speaking of entries in the course of business or duty, that if the party who made the entry is "living, and competent to testify, it is deemed *necessary* to produce him."

We have thus far treated section 120 as if it were applicable to cases like the one in hand. The true sense of the section is, however, very much narrower. Mr. Greenleaf did not say or intend to say that in every case of declaration in the course of duty or business, the presence and oath, or proof of the death and handwriting of the person who made the entries is dispensed with. Not at all; he limits the dispensation to "entries which constitute part of a chain or combination of transactions *between the parties*, the proof of one raising a presumption that another has taken place." Thus a payment is made, and receipt at the same time given. These are two contemporaneous transactions, both between the parties, and the proof of one may rightly raise this presumption. But where one of the transactions is not

between the parties, as where a merchant's clerk makes an entry on the books of his principal for the sole benefit of the principal, or a notary notes the date of demand or service of notice to assist his own memory, or a canal-boat captain certifies to goods on board to enable the collector to assess the tolls, the rule, even as stated by Mr. Greenleaf, does not apply. It may be a sound principle characterizing most of the cases he cites, but it has nothing to do with the case in hand.

For these reasons, we were, at the time of the argument in the Circuit Court, and are still, unconvinced that this Court intended, as Judge Emmons supposed, to revolutionize the principles of the law of evidence in this regard. We then thought that *Nichols* v. *Webb* still stood as the guide for the Circuit Court, though that tribunal declined to follow its leading. We then contended for the rule laid down in *Mima Queen* v. *Hepburn*, 7 Cr. 290:

> That "hearsay evidence is incompetent to establish any specific fact which is in its nature suspectible of being proved by witnesses, who speak from their own knowledge."

But all doubt, it seems to us, whether this Court intended by the cases in 3 Wallace to overrule or limit *Nichols* v. *Webb*, is removed by the case of *Insurance Co.* v. *Weide*, 9 Wall. 677, in which it was held, that without the testimony of "the persons who made them," proving their correctness, the entries in the

day-books and ledger of the plaintiffs "would not have been evidence."

From this it follows that no such revolution, as Judge Emmons fancied, has taken place. The only storm is of his own raising. This Court has been consistent throughout. *Nichols* v. *Webb* has not been over ruled or even questioned, but is expressly repeated in *Insurance Co.* v. *Weide*. And the cases of *Clicquot's* and *Fennerstein's Champagne* must be read, as they were written, to relate to questions of market value only. Therefore the Circuit Court erred, in admitting any of the certificates from the Cincinnati, Dayton, or Piqua books, and our third, fourth, fifth, and seventh assignments of error are well taken.

As is also our sixth; but we do not consider it necessary to discuss the question of the admissibility of the railroad way-bills, but leave the argument already made to apply as well to them.

III.

As to the errors in the charge.

It is not easy for us to consider this charge without warmth. Nevertheless, we will endeavor to examine its manifold errors with the respect due to the dignity of the seat of justice whence it emanated.

In substance, the charge was this: That while, in

the end, the government must prove its claim true beyond a reasonable doubt; yet, if, before the defendants gave any proof, it made out "a plausible, reasonably proved case" (Record, 31), "so far established as to call for explanation" (p. 32), "as to any material part" of its claim, then, if the defendants failed to produce their books and to testify in their own exculpation, "*the law*" presumed against them, resolving "all doubts adversely to their defense" (p. 33); and all reasonable doubts having been thus removed by their fatal omission to prove their innocence by their own testimony and their books, it became the duty of the jury "to resolve all doubts against the defendants," in ascertaining the amount of the penalty to be assessed, by starting with the government's "*prima facie* case for $750,000," or whatever other sum "such case" established, and marking out any or all of it, as far only as the jury could so do "without any doubt or hesitation" (p. 34).

This is no caricature, but a fair, just, and even favorable summary of the charge, and in view of it, we can not believe that the verdict it constrained, establishes even a reasonable suspicion of the defendant's guilt; certainly not so much requires that conclusion as the new trial, granted by Judge Leavitt, after the first verdict, proves their innocence. For such a charge seems to us to deserve the condemnation that it substantially withdrew, from the defendants, their constitutional right of trial by jury, and converted what, at common law and in equity, would have been their protection, viz.,

the right to refuse to testify to their own conviction, into the machinery for their sure destruction, actually placing them in no better position than if they had failed to plead, and the jury had been sworn to assess the debt and damages upon default

Let us examine the errors of this charge in detail.

1. *It erred in relieving the government from the burden of proof, and in imposing it upon the defendants.*

An explanation is here necessary. At the end of the *fourth* exception (p. 37) occurs this sentence: "Then the defendant assumes the burden of proof." It is not contained in the corresponding portion of the charge as incorporated into the bill of exceptions (p. 32). This occurred in this way: Judge Emmons' instructions to the jury were not written, but reports having been made by competent phonographers, one of these, revised by himself, was handed by him to the counsel who afterwards prepared the bill of exceptions, and who had not taken part in the trial or heard the charge, to guide his argument of the motion for new trial and in arrest of judgment. This counsel contended, both in oral and printed debate, that the Court had in form, as well as substance, imposed upon the defendants the burden of proof, and relied upon this sentence as proof that the Judge had distinctly and formally fallen into this error. When Judge Emmons came to sign the bill of exceptions, he could not believe he had ever used this sentence, and erased it from the charge, but by mere inad-

vertence, it was left in the exception as stated in the bill of exceptions.

Nevertheless, it seems to us that the excision of this sentence in no material degree modifies the effect of the charge in requiring the defendants to assume the burden of exculpating themselves.

Judge Emmons seems to have recognized the rule established in the *United States* v. *Brig Burdett*, 9 Pet. 682, that in cases of this kind the defendant must be proved guilty beyond a reasonable doubt; but the value of this recognition was destroyed by his adoption of the doctrine, that if the jury believed the defendant had "within his reach that power" (of explanation, p. 32), and failed to explain, this "without exception," by presumption of *law*, "authorizes a jury to resolve all doubts against him" (p. 33). This he may have thought was imposing the burden of *explanation* only, and something less than a change in the burden of proof, but we cannot make the distinction.

Thus, after admitting that "the case must be made out beyond all reasonable doubt" (p. 32), he said to the jury:

> "You will dismiss from your minds the *perplexing* question, whether it is so made out beyond all doubt. It need not, in the exigencies of this case, be so proved in order to throw the burden of explanation upon the defendant, if from the facts, you believe he has within his reach that power. In the end, all reasonable doubt must be removed, but here, at this stage, you need say only, is the case so far established as to call for explanation." (pp. 32, 37.)

This statement, which is the subject of our *fourth* exception and *eleventh* assignment of error, he proceeded to enforce by iteration in a variety of forms, and with fullness of illustration.

After comparing the case to that of a prisoner caught with a recently stolen watch in his possession, he proceeded to state (as shown by our *fifth* exception (p. 37), as a rule, which, the law assumes, the jury will receive "with unquestioning confidence" (Ib. 33), that if the jury conclude "that, unexplained and uncontroverted by any testimony, the opening proof would enable them to find against the defendants," they would then take up the testimony offered by the defendants, and apply the principle, that—

> "Without exception, where a party has proof in his power, which, if produced, would render certain material facts, *the law presumes* against a party who omits it, and authorizes a jury to resolve all doubts adversely to his defense."

And this the jury were required to do, without "in the smallest degree abating the full application of the principle on any notion that it may have been misapprehended," because—

> "The presumption of *law* is that client and counsel have deliberately, and with full knowledge of the law and all its presumptions, elected to withhold this proof." (p. 32.)

This charge relieved the government from the duty of proving its case at all, unless proof enough to "call for explanation" was compliance therewith.

For it required the jury to find for the government, although no testimony at all were given by the defendants, and although the government had not proved its case as required "in the end."

In the end, said Judge Emmons, (in effect,) the defendants must be proved guilty beyond a reasonable doubt. But that perplexing question should be dismissed from the minds of the jurors, as not applicable to the exigencies of this case, at the time the government rested. Although such proof may not have been then given, yet if enough had been presented to call upon the defendants for explanation, and they did not explain, their silence supplemented the defects in the government's case, and furnished that full proof which should satisfy every reasonable doubt.

What is this but saying that, though in the end, the proof must clearly and beyond reasonable doubt establish the defendants' guilt, the government may, nevertheless, rest without giving such proof; and yet if the defendants do not give any testimony to meet this imperfectly established case, their omission to disprove supplies the defect, and proves their guilt beyond doubt? In other words, the failure of the government to prove its case beyond a reasonable doubt, may require the defendants to prove themselves innocent, and if they do not, then they are guilty beyond such doubt.

We always before supposed that, in such cases, the defendants might rely on the weakness of their antagonist's case; but now it seems that reasonable rule is to be

reversed. The amount of testimony, according to this doctrine, required to convict, is "a plausible, reasonably proved case." Then, although the "plausible, reasonable case" falls short of that full proof which the "law demands in an action so highly penal as this," yet if the jury believe from the facts that the defendant has "within his reach" the power of explanation, the "burden of explanation" is cast on him, and he may no longer remain silent. For if he does, the "plausible, reasonably proved case" ripens, without a word of further proof, into "demonstrative certainty!"

But if the case of *United States* v. *Brig Burdett* applies, something more was necessary in such a case than to establish "a plausible, reasonably proved case," or a case calling for explanation. And if that case be not applicable, and the government were not bound to prove its case true beyond a reasonable doubt, still the burden was on it to *prove* it; not merely to raise a suspicion of the defendant's guilt. For, in law, in view of the rule which imposes upon the party holding the affirmative of the issue the burden of proof, what sort of compliance with the rule is it, to rest, after establishing a case so far as to call for explanation? What would a jury understand, what could this jury have understood from this charge, other than that if reasonable ground for suspicion was made out, the government might rest?

Judge Emmons nowhere defined the extent of proof necessary to call upon the defendant for explana-

tion. At one time (p. 31) he submitted to the jury the question whether, if the defendants had given no testimony, a "plausible, reasonably proved case was made out." At another (p. 34) he told them that:

"*Although you are to resolve all doubts against the defendant*, this does not mean that because the plaintiff makes a *prima facie* case for $750,000, you are to write that down inexorably and stop there. It means that if you believe *such case* is made, you are to start with that, and then carefully consider all the testimony, and so far as you can, *without any doubt or hesitation*, mark out any or all of it, that you will do so."

These are the references made by the Court to the duty of the government to establish its case by proof. The mind of the Judge was, or seems to have been, so impressed with the duty of the defendants to prove themselves innocent beyond a reasonable doubt, that there perhaps seemed to him little necessity to dwell further on the government's duty in the premises.

If the case of *United States* v. *Brig Burdett* is to be our guide, then clearly, we submit, if the government had not, when it rested, proved the truth of its case, beyond reasonable doubt, the defendant was not called on to answer by testimony at all. No "plausible, reasonably proved case," no "case so far established as to call for explanation," no *prima facie* case comes up to the full measure of proof required by this rule.

But if that case do not control this case, and the government were only bound to prove its claim true by preponderance of testimony, we submit that the lan-

guage used in the *fourth* exception had the necessary effect to lead the jury to the conclusion that if they thought the defendant "had within his reach that power," viz., of explanation, the government might stop and call on him to explain. What was this in effect but shifting the burden from the government and upon the defendants?

And when the Court came to consider what this burden "of explanation" required of the defendants, we find that over and over again the jury were told that they were to resolve all doubts against the defendant, and this by force of a *legal* presumption. What was this but the imposition of the burden upon the defendants? If they remained silent, they were to be conclusively presumed guilty, as conclusively as if they had not pleaded. This is precisely what is meant by the burden of proof. Where a cause has arrived at that stage, that he, who does not take a further step, must lose, the burden is on him. The Ohio code states it distinctly in respect to the burden of proof, in section 266, third clause:

> "The party who would be defeated, if no evidence were given on either side, must first produce his evidence; the adverse party will then produce his evidence."

In *Ogletree* v. *The State*, 28 Ala. 693, it was held that, "under an indictment for an assault with intent to murder, a charge which selects a portion only of the facts disclosed by the testimony, and instructs the jury that if these facts are proved, the law presumes that the

act was malicious," and "that the defendant intended to kill," is erroneous, *because it shifts the burden of proof.*

In the printed argument, addressed to Judge Emmons, upon the motions for new trial and in arrest of judgment, the district attorney contended that the burden of proof might and actually did shift. But the rule is firmly established to the contrary. *Powers* v. *Russell*, 13 Pick. 69, 76; *Delano* v. *Bartlett et al.*, 6 Cush. 364; *Central Bridge Corp.* v. *Butler*, 2 Gray, 130.

The burden of proof and the weight of evidence are two different things. In cases like the one under consideration the burden never shifts. But the weight of evidence, as presented by the parties, may vary from side to side. What we contend for is, that when a judge tells a jury that less than the necessary weight of evidence to convict may require the defendant to break silence and avoid the effect of this insufficient proof, by evidence on his part, he really relieves the government of the burden of proof imposed by law upon it, and transfers it to the defendant. More, and perhaps worse, he wipes out the presumption of innocence, and founds upon proofs confessedly inadequate, a presumption of guilt.

In *Tourtellot* v. *Rosebrook*, 11 Met. 460, it was held that, in an action for damages, caused by a fire communicated to the plaintiff's land from a coal-pit, lawfully set on fire by the defendant on his own land, the burden of proving the defendant's negligence is, to the end, upon the plaintiff, and *prima facie* proof of the defend-

ant's negligence does not throw upon him the burden of disproving it.

Nor does establishing a *prima facie* case in a criminal prosecution change the burden of proof. *State* v. *Flye*, 26 Maine, 312; *Commonwealth* v. *Kimbal*, 24 Pick. 373; *Ogletree* v. *State*, 28 Ala. 693.

"Nor are the jury bound to find a verdict of guilty upon a *prima facie* case, even if no rebutting testimony is offered by the defendant. *Swallow* v. *State*, 22 Ala. 20.

"It would, therefore, be manifestly erroneous for a judge to instruct the jury, that if a defendant omitted to avail himself of evidence, within his reach, by which he might have repelled that which was offered to his prejudice, his failure to do so supplied a strong presumption of his guilt. *Doty* v. *State*, 7 Blackford, 427. *For such a charge imports that the burden of proving innocence devolves upon a prisoner after a prima facie case of his guilt is established.* And where an indictment charged a fraudulent alteration of an order by the defendant from nine dollars to nineteen dollars, and the court below ruled 'that if it was proved that the order came into his hands unaltered, and came out of his hands altered, the burden of proof was on him to prove that he did not alter it,' this was held to be erroneous. *State* v. *Flye*, 26 Maine, 312. If, therefore, the defendant, upon his own evidence, and *a fortiori*, upon the evidence for the government, creates a reasonable doubt of his guilt, the prosecution fails, and the burden of proof is not discharged, since the defendant is all along presumed innocent, unless, upon the whole evidence, the jury are satisfied he is guilty." 1 Bennett's Lead. Crim. Cas. 303.

Where the defendant avoids, as by relying on payment, accord and satisfaction, release, etc., undoubtedly the burden of proof shifts. But where he simply tra-

verses or pleads the general issue, surely, in an action for penalties, it does not and can not. Judge Bigelow, in *Commonwealth* v. *McKie*, 1 Gray, 61, says the rule that the defendant is entitled to an acquittal, if the government's case.

"Fails to establish any of the essential elements necessary to constitute a crime," "results, not only from the well-established principle, that the presumption of innocence is to stand until it is overcome by proof, but also from the form of the issue in all criminal cases, which, being always a general denial of the crime charged, necessarily imposes on the government the burden of showing affirmatively the existence of every material fact or ingredient, which the law requires in order to constitute an offense."

That the Court intended to impose the burden of proof upon the defendants is shown by another passage of the charge, which constitutes our *sixth* exception and *thirteenth* assignment of errors. (pp. 33, 38.)

"In 4 Howard's Supreme Court Reports, 242, in a revenue case, *and in reference to circumstances much like these this jury has to consider*, it is said: 'Under these circumstances, the claimant was called upon by the strongest considerations, personal and legal argument, to bring to his defense the best evidence under his control.'"

Now, in 4 Howard, the burden of proof was by law imposed upon the claimant. It is the case of *Clifton* v. *The United States*, and belongs to the class of cases in which, by express statute law, if "probable cause" is proved for the government, to the satisfaction of the *Court*, the

burden of proof is shifted upon the defendant to show that there was no just ground of seizure. Of course, the burden of proof being upon him, he must produce "the best evidence of which the case in its nature is susceptible." 1 Greenl. on Ev., sec. 82. Every party who has the affirmative of an issue assumes this task. The reasons of public policy for such legislation are obvious. He who has in his possession property liable to duties or taxes, which he might not lawfully hold until after payment of such duties or taxes, is in fact ordinarily possessed of the evidence of such payment, and may not unreasonably be called on while so possessed to produce it. The fact lies peculiarly within his knowledge. He is only called to exhibit his ordinary muniments of title. The affirmative is with him. It is easier for him to prove that he did pay than for the government to prove he did not. Therefore it was enacted that—

"In actions, suits, or informations to be brought, where any seizure shall be made pursuant to this act, if the property be claimed by any person, in every case the *onus probandi* shall be upon such claimant. . . . But the *onus probandi* shall be upon the claimant only where probable cause is shown for such prosecution, to be judged of by the *Court* before whom the prosecution is had." 1 Stat. at Large, 678; *Locke* v. *The United States*, 7 Cranch, 339.

But the letter and the reason of the statute apply only to cases of seizure; for when one parts with possession of such property he ordinarily transfers with it

the evidence of his payment of taxes to his vendee, or at least has no longer an interest to preserve it.

In like manner, the 45th section of the act of 1866 imposes the burden of proof upon the claimant, and the 48th section does not, as in an action based on a purpose, it could not well do.

Again, if it was not the purpose of the charge to impose the burden of proof upon the defendants, why were they required to furnish the best evidence in their power? That is a duty which the law does not cast upon a defendant engaged in merely parrying an attack, in raising a doubt; it imposes it upon the party who for the time holds the affirmative of the issue, and has the burden of proof. And yet the Court held that the law required the defendants to produce their books, and themselves to testify, by saying to the jury that, because they had not done so, all doubts must be resolved against them. And as to the testimony actually given for the defendant, the "phalanx of twenty men swearing on their oath to some two thousand barrels of whisky at a given time in a given place," the witnesses produced "as substitutes for these sources of certainty" (the books), the "grocers, physicians, day-laborers, and farmers, who visited this distillery socially or on business," the Court not only contrasted it unfavorably with the "persuasive effect of memoranda made in the ordinary course of business by those who have no motive to falsify" (canal-boat captains), but actually said to the jury:

"Had this case been less important, and the expense and trouble of its retrial less, I am not at all certain but that I should have excluded this testimony altogether, trusting that a higher court would have upheld my decision in reference to what I concede would be a new step in practice." (pp. 35, 39, 40.)

2. *There were no presumptions, either of law or fact, which imposed upon these defendants the duty of explanation.*

If there were, then they attached to the case to the defendants' prejudice when the government rested; for the basis of any presumptions that applied was, as the Court stated, the appearance of ability on the part of the defense to solve doubts which the prosecution had raised. The fact that the defendants did not solve the doubts could not operate to their disadvantage unless they were bound to solve the doubts. That they introduced secondary evidence, could only damage them, if required by law to present primary.

"Where a person is legally bound to speak" (not otherwise), "his omission to deny charges against him is equivalent to an admission of them." *Sampeyreac* v. *United States*, Hempstead, 119.

The Court below, after explaining the rule in the words,

"Without exception, where a party has proof in his power, which, if produced, would render certain material facts, the *law* presumes against a party who omits it, and authorizes a jury to resolve all doubts adversely to his defense,"

proceeded to apply it to the conduct of the defendants in not producing their books, thus:

"It is for you to say whether the defendant did or not keep books of account. The testimony, however, upon this point, seems to be uncontradicted, and that they consisted of day-books, journals, and ledgers. You will act upon your own business knowledge of what in all probability those books contained. *The presumption of law*, I charge you, is that the defendants did keep the accounts usual and necessary for the correct understanding of so large a business, and the accurate accounting from time to time between the several partners interested in it. I say to you that the books of the firm of which H. D. Chaffee was a member, he being dead, belonged of right and are assumed to be in the possession of the surviving partners. *The law presumes also* the books to be in existence and accessible to the defendant, S. L. Chaffee, and his co-defendant, unless the contrary is shown by the evidence. . . . If you believe the books were kept which contained the facts necessary to show the real amount of whisky in the hands of the defendants in October, 1865, and the amount which they had sold during the next ten months, *or that the defendants, or that either of them, could, by their own oath, resolve all doubts on this point*, if you believe this, then the circumstances of this case seem to come fully within this most necessary and beneficent rule." (pp. 34, 38, 39.)

Is it a rule of law or reason that in criminal and other cases in which the government is bound to relieve the minds of the jury of every reasonable doubt, it is sufficient to prove a *prima facie* case, and in addition convince the jury that the defendant could, if he were so minded, put an end to dubiety, by explanations within his power? Has not the defendant the right to stand on the presumption of his innocence and refuse

to give any explanation at all until more than a *prima facie* case is presented against him?

Are not any cases which may seem to the contrary cases where the facts proved raised *legal presumptions* sufficient to justify the action of the jury in convicting, though no testimony had been given for the defense at all? In such cases the proof is convincing beyond a reasonable doubt, until the facts are explained or contradicted.

"To take presumptions," said Lord Stowell, in *Evans* v. *Evans*, 8 Hagg. 105,

"to swell an equivocal and ambiguous fact into a criminal fact, would, I take it, be an entire misapplication of the doctrine of presumptions."

"No one is required," said Lord Tenterden, in *Rex* v. *Burdett*, 4 Barn. & Ald. 140,

"to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction."

If there be any such presumption as is here claimed, it must be because experience has shown that, in point of fact, those who, having the power to explain, under such circumstances omit to do so, take this course because they are guilty. Is this true? Is such the experience of any lawyer? Is it not very much more often the result of legal advice, and that usually wise? Can an experienced lawyer give better counsel to his client, however clear may be his sense of innocence and confidence in its establishment, than to keep quiet and give

no proof, if the government's case has not been proved fully. "Let well enough alone" is good law and good sense.

In *State* v. *Cameron*, 40 Vermont, 566, Judge Steele says:

> "In the great body of cases, no wise practitioner would permit his client, whether he believed him guilty or innocent, to testify when upon trial on a criminal charge."

Conclusive presumptions are founded on "uniformly experienced connections." Disputable presumptions have less force "in proportion to the universality of the experience." Taylor on Ev., sec. 61; Greenl. on Ev., sec. 14. Where is the experience, whether more or less universal, which decides a man guilty who fails to give an account of himself, when only a *prima facie* case is made against him, and that by circumstantial evidence?

The analogy relied on and referred to by the Court, is that of the possession of recently stolen goods. "Possession of the fruits of crime *recently* after its commission is *prima facie* evidence of *guilty* possession." Taylor on Ev., sec. 122; Greenl. on Ev., sec. 34. Why is this? Simply because such possession is proved by experience to be usually that of the thief. Does any such experience apply to cases like that in hand?

All presumptions may be applied to cases by syllogistic statement; the only difference being that whereas conclusive presumptions are unconditional syllogisms, the major premiss of the syllogistic statement of a dis-

putable presumption is conditional, or not universally true. Thus: *major*, he who is in possession of recently stolen goods is the thief; *minor*, A. is possessed of recently stolen goods; *ergo*, A. is the thief. Here the truth of the *major* depends on a condition, which may be added, viz: "if unable to explain." Hence the presumption is disputable; or, in other words, you may contradict the major premiss.

Take the case of the application of a conclusive presumption: He who has misled another to his injury by a false statement shall not deny its truth. A. has misled B. to his injury by a false statement. *Ergo*, A. shall make the statement true.

Now attempt to reduce to a syllogistic form cases like this, thus: Although there may be doubt of the defendant's guilt, he is guilty if he can remove or confirm the doubt, and does neither. It is not certain that Chaffee is guilty, but he could show his innocence if he chose. *Ergo*, he is guilty. What is this but to reverse the rule, and require the prisoner to prove his innocence.

We do not deny that the omission of the defendant to explain may be fairly considered by the jury. Mr. Wharton (American Criminal Law, sec. 743). states the rule cautiously thus (the italics are his own):

"In cases where the fact of guilt is not proved by positive and satisfactory testimony, the most authoritative text-writers unite in suggesting the following cautions: 1. *The onus of proving everything essential to the establishment of the charge lies on the*

prosecutor, though the non-production of explanatory evidence, clearly in the power of defendant, must weigh against him."

But whatever weight the jury may find in such non-production, it can not, as it seems to us, be the basis of a presumption of any kind. Its weight depends on many collateral circumstances, and must be governed by the peculiar relations of the case.

In the next place, let us consider what it was that, in the opinion of the Court, led to a presumption of the defendants' guilt. It was their omission to testify, or to produce their books. With regard to these, we claim:

That the omission to produce books and papers, does not justify a presumption against a defendant, where the onus probandi is not upon him.

The case relied on to prove the contrary is *Clifton* v. *The United States*, 4 How. 242, where the *onus probandi* was on the claimant, and he was therefore bound to produce the *best* evidence.

In *Hanson et al.* v. *Lessee of Eustace*, 2 How. 653, the whole subject was fully considered by the Supreme Court shortly before the decision in *Clifton* v. *The United States*, and the latter case was decided without any reference to the former, and as if there was no conflict, as, in our view, there is none really between them. It was a case in which the existence of a deed being in dispute, and circumstantial evidence having been given, it was sought to eke out its defects by presumptions

founded on a refusal to produce books and papers. The Court below (Judge Baldwin) had charged in favor of the supposed presumption. The Supreme Court reversed, and in reversing went to the length of deciding not only that under such circumstances the law did not raise a presumption, but that the jury even were not at liberty to consider such refusal "as one of the reasons upon which to presume a deed." The Court held (page 708) that the only consequence in law of such refusal is to lay the foundation for secondary evidence, and when such is introduced, the extent of the damage done by such refusal to the refuser is that—

"All inferences shall be taken from the inferior evidence most strongly against the party refusing to produce, but the refusal itself creates no presumption of suspicion or imputation to the discredit of the party, except in a case of spoliation or equivalent suppression. There the rule is that *omnia presumantur contra spoliatorem.* In other words, with the exception just mentioned, the refusal to produce books or papers upon notice is not an independent element from which anything can be inferred as to the point which is sought to be proved by the books or papers. *Nor can any views of policy growing out of the refusal be associated with the secondary evidence, to enlarge the province of the jury to infer or pronounce the existence of the fact to which that evidence relates. For considerations of policy, being the source, origin, and support of artificial presumptions, having no application to conclusions as to actual matters of fact, the finding of a jury in conformity with such considerations, and not according to their actual conviction of the truth, resolves itself into a rule or presumption of law.*"

To the same effect, see also 1 Taylor on Ev., sec.

102; 1 Greenl. on Ev., sec. 37; *Life and Fire Ins Co.* v. *Mechanic Insurance Co.*, 7 Wend. 33.

It must not be forgotten that the defendants' books were not evidence which they could use in their own favor. Had they been offered, the government might have interposed a successful objection, on the ground that the plaintiff's case ought not to be exposed to the hazard of defeat by proofs manufactured to suit the occasion. The presumption, if any existed, was founded on the defendants' neglect to produce these books in conformity with the notice served by the district attorney, for his use, at the trial (pp. 30, 43). And the only effect it could, in law, have had, was to enable the district attorney to prove the contents of the books by secondary evidence.

Nor did the omission of the defendants to testify require or justify any conclusion against them.

We have already quoted, in part, the instructions as to the effect of the silence of the defendants. The same view was more than once presented to the jury. Thus, after referring to a conversation with S. L. Chaffee, which one of the government witnesses, called, however, in rebuttal, had repeated, in which Chaffee, according to the witness, admitted that he had little or no whisky at the distillery, some time in 1865, the Court said:

"The law, acting upon well-settled principles of common reason, says that when such testimony is given, and the defend-

ant is by and makes no denial, all doubts are resolved against him."

Again, alluding to the same testimony—

"Whether it is put in rebuttal or in chief, has no significancy whatever in reference to the application of this principle of presumption."

And again—

"Where there is certainty, this rule has no application. It is only where it is vague and doubtful that it comes in to relieve you from the doubt and perplexity which the silence of the defendants occasions."

And again, after alluding to the defendants' claim that they had on hand two or three thousand barrels of whisky in October, 1865, the Court said:

"How is this proved? Two intelligent parties whom you are warranted in presuming must know with certainty this great leading fact, refuse to testify. The law accords to them liberty to speak, and yet they remain silent. The books are also withheld."

The Judge then proceeded to speak disparagingly of the proof the defendants did furnish, by the oaths of their neighbors and friends who saw the whisky on hand, and concluded:

"And now, gentlemen, in view of this state of facts, what should be your application of the rule of law that doubts should be resolved against the defendants? You certainly, it would seem to me, will be unable to fix, with entire confidence, upon

any specific amount of whisky on hand in October, 1865. It certainly presents a case where you cannot say but there is doubt. It is a doubt in the power of the defendant to remove. If he does not do so, the law pronounces what your duty is."

Until July 2, 1864, parties were not allowed to testify in their own behalf in the Federal Courts. The permission to do so was accorded, in these words, by the proviso to the third section of the appropriation bill then approved (13 Statutes at Large, 351):

"*Provided*, that in the Courts of the United States, there shall be no exclusion of any witness on account of color, nor in civil actions because he is a party to, or interested in the issue tried."

Is this act to be so construed, that in an action for a penalty, if the defendant does not testify, he shall be presumed guilty?

Such construction manifestly puts a stress upon the party, which the law does not, in its letter at least. It does not say he shall testify, but that he may testify. To give it this construction is therefore practically to amend it, to substitute for the permission a mandate, to require the party to speak where the law allows to him to remain silent.

Nor is this all. It is an amendment, which, put in direct terms, Congress would have been extremely unlikely to have adopted, because contrary to public policy and to the settled principles of jurisprudence in England and America.

First: to public policy. For what is clearer than that the public have no interest in requiring the exposure of the innocent to the trials of such a position, in which he is extremely likely to be misunderstood and disbelieved, or the guilty to the temptation to commit perjury? See 40 Vermont, 566, where the true policy of the public is well stated, *State* v. *Cameron.*

What would be more likely to tempt a dishonest man, charged upon doubtful circumstantial evidence, with frauds of which he is really guilty, to add perjury to villainy, than to be told that his silence will be his conviction? The question in all such cases will be, is the defendant rogue enough to swear himself clear? If he is not a villain, or only a half-way rogue, he may hold his tongue, but a thorough-paced scoundrel will surely speak, and speaking, will lie. It is upon this foundation that our fathers established the constitutional inhibition, "that no person shall be compelled in any criminal case to be a witness against himself." Constitution of U. S., Amendment 5. No innocent man ought to be tempted, no guilty party required, to falsify.

The policy of the common law, for centuries, excluded, for this very reason, interested witnesses. 1 Greenl. on Ev., sec. 386. A different policy prevails now, but it has not gone to the extent of requiring such testimony, or of attaching penalties to the omission to employ it.

The true public policy is indicated by the safe-

guards thrown around the reception of testimony from the accused in criminal cases, in those states which have relaxed the rule so far as to permit it to be given. Thus in Ohio (Swan & Sayler, 613), the permission to the accused to testify is thus guarded:

"Nor shall the neglect or refusal to testify, create any presumption against him, nor shall any reference be made to, nor any comment upon, such neglect or refusal."

In California:

"Nothing herein contained shall be construed as compelling any such person to testify."

Upon the trial of the case of *The People* v. *Tyler*, the district attorney called attention to the fact that the accused had not availed himself of the privilege of testifying, and attempted to draw an inference of his guilt. Defendant's counsel objected, and asked the Court to require the district attorney to refrain from urging such inference, and afterwards asked the Court to charge the jury that no such inference could properly be drawn, but the Court declined to interfere upon either occasion. Upon a writ of error to the Supreme Court, the judgment was reversed. Chief Justice Sawyer, now Judge of the Circuit Court of the United States for the California circuit, in a very able opinion, reversed the judgment of conviction. Among other things he argued that the direct effect of the inference was to deprive the defendant of the option which the

statute secured to him, and added (the italics are his own):

"If the inference in question could be legally drawn, *the very act of exercising his option* as to going upon the stand as a witness, *which he is necessarily compelled by the adoption of the statute to exercise one way or the other*, would be at least, *to the extent of the weight given by the jury to the inference arising from his declining to testify, a crimination of himself.*" *People* v. *Tyler*, 36 Cal. 522. See also *People* v. *Anderson*, 39 Cal. 703.

In *State* v. *Cameron*, 40 Vt. 555, it was held that the failure of the Court, upon request, to prevent the prosecuting counsel from arguing to the jury that the omission of the respondent to testify was evidence against him, constitutes such error and irregularity as to require the verdict to be set aside, and a new trial granted, and is a proper subject of exception. Judge Steele says (p. 566):

"It is no question of law whether this matter is to be considered by the jury. By the express terms of the statute, as well as the fair interpretation of the constitution, it is forbidden. The respondent's omission to testify, not only by law creates no presumption against him, but it permits no such presumption. The statute permitting the prisoner to testify for himself is a mere statute of privilege."

Even if it should be admitted that, in the absence of such express statutory safeguards, the jury may be warranted in inferring guilt from an omission to testify, this falls far short of a legal presumption of guilt to be

stated by the Court, and which the jury are required to draw. *State* v. *Bartlett*, 55 Maine, 200, 220.

Secondly: To the well settled principles of jurisprudence in England and America. As these are founded on the very policy just considered, this is only a different form or continuation of the same argument. Among these principles, none is better settled than that no witness shall be compelled to testify, where "the answer will subject him to a forfeiture of his estate."

"In this case," says Mr. Greenleaf, 1 Ev., sec. 453, "as well as in the case of an exposure to a criminal prosecution or penalty, it is well settled that a witness is not bound to answer. And this is an established rule in equity, as well as at law."

So also in equity, no party can be compelled to make discovery of matters "tending to criminate himself, or to expose him to a penalty of forfeiture." Adams on Equity, *2, *343; *U. S.* v. *Saline Bank et al.*, 1 Pet. 100.

A modification of the rule upon this subject was adopted by act of Congress in 1868 (15 Statutes at Large, 37), which is entitled to much consideration here. We quote the act entire:

"An act for the protection, in certain cases, of persons making disclosures as parties, or testifying as witnesses.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That no answer or other pleading of any party, and no discovery, or evidence obtained by means of any judicial proceeding from any

party or witness in this or any foreign country, shall be given in evidence, or in any manner used against such party or witness, or his property or estate, in any court of the United States, or in any proceeding by or before any officer of the United States, in respect to any crime, or for the enforcement of any penalty or forfeiture by reason of any act or omission of such party or witness: *Provided*, That nothing in this act shall be construed to exempt any party or witness from prosecution and punishment for perjury committed by him in discovery or testifying as aforesaid.

"SEC. 2. *And be it further enacted*, That this act shall take effect from its passage, and shall apply to all pending proceedings, as well as to those hereafter instituted." Approved February 25, 1868.

If this act does not apply to this case, it at least shows plainly enough that Congress has no purpose to relax the ancient rule that no one shall be compelled to give evidence which may tend to expose him to a penalty, by providing, that though the testimony shall be given, it shall not be used against him.

But the act has a direct application to the case at bar. Suppose Chaffee had been examined by the government, or for himself, he could not, under this act, have declined to answer any relevant question. He could not withhold discovery in equity. The act includes "discovery or evidence," from "party or witness." But his answer could not be used against him. How then can his neglect to testify be the basis of a legal presumption of his guilt, if his confession of guilt would be made under the protection of this act?

But suppose that the true construction of the act is

that his answer or discovery, in one case, shall not be used against him, in another, brought for the enforcement of a penalty, how does it help the government? His silence in the latter case is a confession of guilt, is it? Why not allow the use of the direct confession then? Does it not follow that upon either theory, the object of Congress was plain, viz., to secure to the accused full and ample protection against being compelled to convict himself of crime, or render himself liable to a penalty? And shall that be allowed by legal inference which is forbidden directly?

The law has always been careful not to infer guilt from doubtful conduct, much less from silence. There have been too many cases of the fabrication of evidence, and even of confessions of guilt by the innocent, to allow mere silence to have much weight. Lord Coke (3 Inst. 104) mentions a striking case of an uncle, who was hanged for the murder of his niece, the fact that weighed most against him being that he induced another child to personate his niece. Years after his execution, the child, who, having been ill-treated, had absconded, re-appeared. Mr. Wharton (American Criminal Law, sec. 696) says:

"This rule (viz., that silence gives consent, or is a tacit admission,) does not apply to silence at a judicial hearing. Thus where the deposition of a witness, or examination of another prisoner before a magistrate, in presence of the prisoner, contains some statement affecting the prisoner, such statement is not admissible in evidence, even as an implied admission."

In *Scovill* v. *Baldwin*, 27 Conn. 316, an attempt was made to deduce a legal conclusion against a party from the fact that he had not called a particular witness. The Court denied—

"That this was any ground for a presumption that the testimony of the witness would have been unfavorable. The jury have no right to presume anything as to his knowledge of any facts important to the case."

3. *If any presumptions were to be drawn from the silence of the defendants, and their non-production of the books, they were presumptions of fact, not of law.*

We have already quoted the often-repeated, severe, and unqualified terms in which the Court required the jury to presume the defendants guilty. Our contention here is, that if the Court had the right to give any direction at all to the jury upon the subject, which we do not admit, it should have been that they were at liberty, not that the law compelled them to arrive at this conclusion. In stating it as presumption of law, the Court did, in its own language, "bow a little too far over the fence which separates the field of your labors from mine."

The difference between disputable presumptions of law and presumptions of fact is quite clear. The former are founded on sequences of facts more or less usual. Thus, possession of *recently* stolen goods is usually that of the thief. Therefore, it is sometimes said

that in such cases the *law* presumes guilt. Mr. Wharton, however, says (American Criminal Law, sec. 729), "The presumption is one, not of law, but of fact."

But how different is a single act from a complex case of numerous circumstances involving varied relations of persons and things. One may say that guilt is predicable of the possession of recently stolen goods, death of seven years absence, ownership of possession, and the like, because mankind has been accustomed to observe that such cases usually involve the relation of cause and effect. But when a large number of acts and facts are presented, the relations between them are too complex to draw *legal* conclusions. We can not find a case in which the stress of circumstantial evidence ever has given rise to legal presumptions.

Mr. Greenleaf, speaking of presumptions of fact (1 Ev., sec. 44), says:

> "They differ from presumptions of law in this essential respect, that while those are reduced to fixed rules, and constitute a branch of the particular system of jurisprudence to which they belong, these merely natural presumptions are derived wholly and directly from the circumstances of the particular case, by means of the common experience of mankind, without the aid or control of any rules of law whatever. Such, for example, is the inference of guilt, drawn from the discovery of a broken knife in the pocket of the prisoner, the other part of the blade being found sticking in the window of a house, which, by means of such an instrument, had been burglariously entered."

That it is the exclusive province of the jury to as-

certain and apply the presumptions of fact arising in each case, see Greenl. on Ev., sec. 48.

In *Lessee of Dickins* v. *Mahance*, 21 Howard, 576, the question was whether the Secretary of the Treasury had reserved school lots from certain lands ordered to be sold. Various circumstances were proved, tending to this conclusion, which are fully set forth by the Court. The Supreme Court of Ohio, in the case of *Coombs and Ewing* v. *Lane*, had decided that these circumstances justified and required this conclusion, and so the Circuit Court charged the jury. But the Supreme Court held that this charge was erroneous, and therefore reversed the judgment, and ordered a *venire facias de novo*. The Court say:

> "Whether or not he" (the secretary) "had exercised this power was a question to be decided by the jury, upon the evidence, and in deciding that it was a legal presumption, the court erred." . . "In the language of the Supreme Court of Ohio, in the case of *Coombs and Ewing* v. *Lane*, 'facts presumed are as effectually established as facts proved where no presumption is allowed.' That was a suit for the possession of this same land, and involved the same question as this case does, and presented the same questions of law. But there the case was submitted to the court on the law and the facts without the intervention of a jury, and the Supreme Court appealed to, in order to reverse the opinion of the lower court, on a motion for a new trial. The state courts dealt with both facts and law, whereas here the jury must deal with the facts and presumptions under the instructions of the court as respects the law."

In *Blackburn* v. *Crawfords*, 3 Wall. 175, it was held to be

"Error to instruct the jury that if a man and woman live together as husband and wife, and the man acknowledge the woman as his wife, and always treat the children which she bore him as his children, and permit them to be called by his name, then that *the presumption of law* is in favor of their legitimacy. The question of legitimacy under such circumstances is a question for the jury, the law making no presumptions about it."

In *United States* v. *Gilbert et al.*, 2 Sumn. 75, certain confessions and written examination of the accused had been suppressed by the district attorney, and the Court were asked to charge that this "afforded a legal presumption that if the same were brought, the legal effect would be in favor of the prisoner." Judge Story declined so to instruct the jury, but—

"Left the matter at large to the jury as matter of fact and presumption of fact to be weighed by the jury, but with the express direction that they ought not to presume anything therefore unfavorable to the prisoners. There was no matter of presumption of law in the case, but of presumption of fact only."

It may perhaps be objected to the applicability of the cases we have cited from California and Vermont, as to the effect of the silence of the accused in a criminal case, that in those states, by express statutory provision, no inference is to be drawn from such silence adverse to the prisoner. But in Maine there is no such provision of law, and there the inference may be drawn. But it is to be drawn if at all, not by the Court, but by the jury. *State* v. *Barrett*, 55 Maine, 200, 220. The Court say they regard it—

"As a fact in the case proper for the consideration of the

jury. . . . The particular weight to be attached to this circumstance must depend upon the circumstances of each case, and be intrusted to the good sense and intelligence of the jury, under the advice of the court. . . . No fixed and definite rule can be laid down with reference to it."

In *Tompkins* v. *The State*, 32 Ala. 569, the Court below had charged the jury that "if there is a single link wanting in the chain of circumstantial evidence, the jury are bound to acquit the defendant." The Supreme Court reversed, holding that circumstantial evidence is not necessarily composed of links, and that no rule of law prescribes, as necessary to full proof, any definite number of circumstances.

"There may be," they continue, "and are cases where a single circumstance will justify the jury in finding the existence of an inferential fact. Unexplained possession of an article recently stolen is of this class, and from this single circumstance the jury may and frequently do, draw the inference that the party thus found in possession is the thief. Circumstances, however, may be admissible in evidence, which are much less determinate and satisfactory. The weight of pertinent circumstances, their influence on the minds of the jury, can rarely become a question of law, although there are certain rules for weighing them, which the court should not hesitate to give."

The case of *Methard* v. *The State*, 19 Ohio St. 363, was decided by the Supreme Court of Ohio in 1869. We quote the following from the *syllabus*, which, in Ohio, is the only authoritative exposition of the judgment of the whole Court. The italics are from the report:

"The facts that a building was burglariously entered, goods stolen therefrom, and the possession by the accused soon thereafter of the goods stolen, are competent evidence to go to the jury, and with other circumstances indicative of guilt, such as giving a false account, or refusing to give any account, of the manner in which, or the means by which, he came into possession of the stolen goods, may afford a strong *presumption of fact* of the guilt of the accused, and warrant the jury in finding him guilty of both the burglary and larceny. But the facts of burglary, of larceny, and of possession of the stolen goods soon thereafter by the accused do not, alone, raise a *presumption of law* that he is guilty of both the burglary and larceny."

The following extract from the opinion of Brinkerhoff, J., more fully states the rule:

"The burglary alleged was the breaking and entering a smoke-house. The evidence tended to show that the smoke-house was broken into, a number of hams stolen, and that they were found in the prisoner's possession, and by him offered for sale the next day. The court charged the jury that 'where there has been a larceny of goods, a person found in the possession of the stolen goods recently thereafter, is, in law, presumed to have committed the larceny; and if there was a burglary and entry of said smoke-house, in the night season, as charged, and a larceny of goods therein, and the goods stolen, or any part thereof, were found in the possession of the defendant the next day, the law presumes that he not only stole the property, but that he also committed the burglary; and it is for the defendant to show that he came honestly by the goods.'

"We think the court stated the doctrine too strongly. The facts that a building was burglariously entered, goods stolen therefrom, and the possession, by the accused soon thereafter, of the goods stolen, are competent evidence to go to the jury, and, in connection with other circumstances indicative of guilt, such as giving a false account, or refusing to give any account, of the

manner in which, or the means by which, he came into possession of the stolen goods, they may afford a strong presumption of fact of the guilt of the accused, and warrant the jury in finding him guilty of both the burglary and larceny. But we are not prepared to say that the facts of burglary, of larceny, and of the possession of the stolen goods soon thereafter by the accused, alone raise a presumption of law that he is guilty of both the burglary and larceny. 'Nothing can be more persuasive than the circumstance of possession commonly is, when corroborated by other criminative circumstances; nothing more inconclusive, supposing it to stand alone.' And 'whatever the nature of the evidence, the jury must be morally convinced of the guilt of the accused, who is not to be condemned on any artificial presumption or technical reasoning, however true and just in the abstract.' Best on Presumptions, sec. 230.

"Judgment reversed and cause remanded."

4. *Were there any such presumption, its effect would be disputable, and not conclusive of the defendant's guilt.*

The Court below repeatedly instructed the jury that they were to resolve all doubts against the defendants, and conclusively presume them guilty.

Thus (p. 32): "Without exception, where a party has proof in his power, which, if produced, would render certain material facts, *the law* presumes against a party who omits it, *and authorizes a jury to resolve all doubts adversely to his defense.*"

And again (p. 34):

"If you believe the books were kept which contained the facts necessary to show the real amount of whisky in the hands of the defendants in October, 1865, and the amount which they had sold during the next ten months, or that the defendants or that either of them could by their own oath resolve all doubts

on this point, if you believe this, then the circumstances of this case seem to come fully within this most necessary and beneficent rule."

And again (same page):

"And now, in the light of this rule, let us proceed briefly to consider the defendants' case. And first, I repeat, for the purpose of explanation only, that it is claimed on the part of the defendant, the evidence of the government is uncertain, and may lead to duplication. Although you are to resolve all doubts against the defendant, this does not mean that, because the plaintiff makes a *prima facie* case for $750,000, you are to write that down inexorably, and stop there. It means that if you believe such case is made, you are to start with that, and then carefully consider all the testimony, and so far as you can, from any source, without any doubt or hesitation, mark out any or all of it, that you will so do; where there is certainty, this rule has no application. It is only where it is vague and doubtful that it comes in to relieve you from the doubt and perplexity which the silence of the defendant occasions."

And again (p. 35):

"And now, gentlemen, in view of this state of facts, what should be *your application of the rule of law that doubts should be resolved against the defendants?* You certainly, it would seem to me, will be unable to fix with entire confidence upon any specific amount of whisky on hand in October, 1865. It certainly presents a case where you can not say but there is doubt. It is a doubt in the power of the defendant to remove. If he does not do so, the law pronounces what your duty is."

It has happened very infrequently that Courts have directed juries thus, in this country, or in modern times, so that, fortunately, errors of this kind have

rarely required correction, at least since the era of reported decisions. In one case in New York, however, the subject of a like misdirection came before the Court of Appeals, in the case of *Gordon* v. *The People*, 33 N. Y. 501.

The Court of Oyer and Terminer had held the absence of any attempt by a prisoner to account for his whereabouts, it appearing to have been in his power to do so, conclusive of his guilt. The Court of Appeals reversed the judgment, holding that—

"When one accused of the crime of murder is required to account for his whereabouts at a particular time, to avoid the force of criminating circumstances, his omission to produce such evidence is not, in law, conclusive of the facts in dispute.

"The absence of an attempt to account for his whereabouts, when it appears to be in the power of the prisoner to do so, is strong presumptive *evidence* against him. But the force of such circumstance must be left for the consideration of the jury; and it is error for the court to instruct them that it is 'of a conclusive character;' or that, by such omission, doubtful evidence of guilt 'ripens into certainty.'"

5. *The Court erred in withdrawing the case, or, at least, substantial portions of it, from the jury.*

We have quoted the significant words by which Judge Emmons showed his apprehensiveness that he had trespassed upon the domain of the jury. We now desire to call the Court's attention to other passages of the charge, covered by the exceptions, in which he stated his opinions of the weight of testimony, as attained conclusions. Any one at all cognizant of the respect with

which the least word of a federal judge is held and followed by juries in this circuit, will understand how little chance the defendants had to obtain a verdict after the weighty sentences we shall quote had been pronounced.

But, first, to show the importance of the statements made by the Court, we will call attention to the admitted facts.

The period within which the alleged wrong was charged, or, as Judge Emmons said, "committed" (p. 30), was between October, 1865, and September, 1866. The defendants had paid taxes on 6,045 barrels of whisky manufactured by them, and 5,529 barrels were shown to have been sold for them, during this time, by sundry consignees at Cincinnati, Baltimore, Philadelphia, and elsewhere; 4,505 barrels were claimed to have been transported by rail (p. 29). To this the government sought to add, by the evidence derived from the Dayton, Piqua, and Cincinnati books, 2,439 barrels over and above the quantity admitted to have been already charged as sold by the consignees.

It is obvious that in attempting thus to arrive at a conclusion how much whisky the defendants had really manufactured or sold between these dates, there were two great dangers of error being committed by the jury to the injury of the defendants, viz: *First*, the danger of duplication, or that the same whisky might be counted twice; and *secondly*, that of assuming that they had no

whisky in October, 1865, or of omitting to give them credit, as they were entitled, for whisky then on hand.

A large number of witnesses were examined on both sides as to the quantity of whisky on hand in October, 1865. The weight of their testimony was peculiarly within the province of the jury. If the jury could draw no conclusion at all, then the defendants would receive no credit on that account, and obviously, it was to the highest interest of the defendants that the jury should be left to draw their own conclusion without any instruction to govern them as to the weight of the conflicting testimony. For it is of the essence of the "right" of trial by jury, that the Court, whose instructions they are only too willing to follow, should abstain from telling the jury what the result of any conflict of evidence may be. That is for them to decide: otherwise, trial by jury becomes trial by Court, as was well shown in *Lessee of Dickins* v. *Mahance*, *ut supra*. And as to the danger of duplication, the Court, it would seem, should have pointed it out, and left the jury, warned against its possibility, to avoid it.

Just how the Court discharged its duty in the premises may be seen by the following extracts:

"It is claimed that the evidence of these consignees, and especially the testimony of the way-bills, is very delusive; that it tends to duplication, and that you will be very likely to charge these defendants twice over with the same amount. So far as the nature of this testimony is concerned, there has been, in modern times, a very great change of opinion; and I do not know that if I should search all the books I ever read, or call to

mind all my experience at the bar, I could select a more fitting instance to illustrate my own opinion of the respective values of these two classes of testimony than the contrast between the persuasive effect of memoranda, made in the ordinary course of business by those who have no motive to falsify—whose duty it was to record them at the time the transactions took place—on the one hand, and on the other the grossly conflicting verbal testimony given in this cause as to the amount of whisky on hand in October, 1865. Compare the two, and see upon which, in its own nature, as men of common sense, you can repose your credence with most confidence. The one is plain, simple, and direct, without a motive of falsification. The other presents a spectacle like this: A phalanx of twenty men swearing on their oaths to some two thousand barrels of whisky, at a given time, in a given place, and two-thirds as many, equally intelligent and equally respectable, with equal opportunities of knowledge, swearing there is not fifty barrels there. It is a hapless conflict, leaving the mind in uncertainty, with nothing whatever to rest upon." (p. 31.)

This extract is the subject of our *second* exception and *ninth* assignment of errors. It deprived the defendants of every possible benefit of any quantity of whisky, which the jury, uninformed that the testimony was in "*hapless conflict, leaving the mind in uncertainty, with nothing whatever to rest upon*," might have concluded was on hand in October, 1865.

And again (p. 32):

"The only liability to error is the danger of duplication. The way-bills, the railroad shipments, the canal-books, are attacked, not so much on account of what they say, as the danger that they may speak twice upon the same subject. But it would seem to me that such a mistake is wholly unnecessary. The date, the quantities shipped, the shipments themselves, the consignees' names, all unite in preventing confusion."

Thus deprived of the benefit of testimony as to the quantity of whisky on hand in October, 1865, and exposed, without any caution against duplication by the Judge, or rather with what, as it seems to us, amounted to a statement that none was necessary, how much of the right of jury trial was left to the defendants, when the Court, one of the original defendants having deceased, and the others not choosing to offer themselves as witnesses, or to furnish the government with their books, papers, and documents upon notice, preferring to leave the district attorney to procure his testimony in the ordinary way by calling witnesses whom they could cross-examine, and by *subpena duces tecum*, told the jury in the passage which constitutes our *twelfth* exception and *ninteeenth* assignment of error, that though they were to resolve all doubts against the defendant, this did not mean that they should inexorably write down the government's *prima facie* case and stop there, but that beginning there, they should "*mark out* any or all of it," so far as they could, "*without any doubt or hesitation?*"

We respectfully submit that we have sustained our assignments of error, and are entitled to a *venire facias de novo.*

GEO. HOADLY,
EDGAR M. JOHNSON,
J. D. COX,
JOHN F. FOLLETT,
Of Counsel for Plaintiffs in Error.

CINCINNATI, *December* 22, 1873.

Supreme Court of the United States.

DECEMBER TERM, 1873.

SIDNEY L. CHAFFEE AND RUE P. HUTCHINS, Plaintiffs in Error,

vs. No.

THE UNITED STATES OF AMERICA, Defendants in Error.

ERROR TO THE CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

SUPPLIMENTAL BRIEF FOR PLAINTIFFS IN ERROR.

No inference against the defendants below could be drawn from the non-production of books; and the charge of the court in relation thereto, as set forth in the 12th, 13th, 15th, 16th, 17th, and 18th assignments of error, is clearly erroneous.

The Bill of Exceptions (Rec., p. 30) sets forth that—

"S. L. Chaffee was present in court during the entire trial, and Rue P. Hutchins was in court at the close of defendant's testimony. Before the commencement of the trial to wit: On the 3d day of March, 1870, the Government caused a notice to be served on the counsel for the defendants, of which a copy is hereto annexed, marked exhibit 'D.' At the close of the defendant's testimony, the books and papers mentioned in said notice not having been produced, counsel for the Government called for their production, and the counsel for the defendants made a statement as to what had become of the books of H. D. Chaffee & Co. But counsel for the Government objected to said statement, and asked that the books and papers should be produced; and that S. L. Chaffee should be called as a witness for

defendants set up a plea in bar, alleging that the discovery would subject them to penalties under the statute of Virginia.

"The court below decided in favor of the validity of the plea, and dismissed the bill.

"It is apparent that in every step of the suit the facts required to be discovered in support of the suit would expose the parties to danger.

"The rule clearly is, that a party is not bound to make any discovery which would expose him to penalties, and this falls within it. The decree of the court below is therefore affirmed."

Thus summarily did this court, speaking through its chief justice, dispose of the question.

The case of *Finch* v. *Rixeman et al.*, 2 Bl. C. C., 301, decided by Judge Betts, illustrates the proper application of this rule of equity.

It was an action on the case to recover damages for infringement of letters patent. A motion was made, upon proper notice, to require the defendants to produce their books, it being claimed the books would show the number of patent articles made and sold. In deciding the motion Judge Betts says:

"The motion demands the production of the defendant's books, to establish the quantity and the value of the manufacture of machinery made by the defendants, which manufacture is charged in the declaration to be an infringement of the plaintiff's patent. The effect of the evidence sought for, will be not only to enable the plaintiff to recover his entire damages, but its direct consequence will be to subject the defendants to a penalty of three times the amount of those damages, under sec. 14 of the act of July 4, 1836. (5 U. S. Stat. at Large, 123.) We think it against the rules of equity to allow a bill of discovery in such a case, unless the bill relinquishes all claim to the penalty which may be superinduced by the production and exhibition of the books, and for that cause the motion must be denied."

See also Atwill *v.* Ferrett, 2 Bl. C. C., 40.

Stewart *v.* Drasha, 4 McClean, 563.

United States *v.* Twenty-eight Packages, &c., Gilpin, 306.

Houghton *v.* Loudon & Co., 17 C. B., (N. S.,) 80.
Currier *v.* Concord R. Co., 48 N. H., 321.
Thompson *v.* Erie R. Co., 9 Ab. (N. Y.) Pr., N. S., 212–230.
Vandeveer *v.* Holcomb, 2 Green, (N. J.,) 87.
Lindsley *v.* James, 3 Cold., (Term,) 477.

GEO. HOADLEY,
JNO. F. FOLLETT,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1873.

No. 193.

SIDNEY L. CHAFFEE AND RUE P. HUTCHINS,
PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

Error to the Circuit Court for the Southern District of Ohio.

BRIEF FOR DEFENDANTS IN ERROR.

Supreme Court of the United States.

OCTOBER TERM, 1873.

No. 193.

SIDNEY L. CHAFFEE AND RUE P. HUTCHINS,
PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

Error to the Circuit Court for the Southern District of Ohio.

BRIEF FOR DEFENDANTS IN ERROR.

We accept the statement of facts made by the learned counsel for the plaintiffs in error, in their brief, asking permission upon one point to take from the record two or three matters of detail, which do not appear in that brief. This has been done, as it appeared to be more convenient for the court and opposite counsel, in the part of our argument which discusses that point, *viz*: the competency of certain *entries* which were admitted in evidence.

I. Pursuing the order in which the learned counsel have argued their assignments, we first (Brief, p. 26) meet that in which it is alleged for error that the court below *overruled the demurrer*, and then *refused to arrest judgment.*

The 48th section of the act of 1864 (correctly given in the Brief, pp. 26 *et seq.*) provides that all *articles, &c.*, subject to to taxes, *which shall be found in the possession, or custody, or within the control of any person, for the purpose of being* SOLD *or* REMOVED *by such person, in fraud of the revenue laws, or with design to avoid payment of said taxes, may be seized, and shall be forfeited:* also, that *any person who shall have in his custody or possession any such articles, &c., subject to tax, as aforesaid, for the purpose of* SELLING *the same, with the design of avoiding payment of the taxes, shall be liable to a penalty of* $500, *or not less than double the amount of taxes fraudulently attempted to be evaded," &c.* It then proceeds to provide that the *articles, &c.*, "*which shall be so seized* may, pending proceedings against them, be disposed of in a certain manner."

We submit that the theory upon which the declaration below was framed, *viz:* that the clause in the above section, providing for a *penalty*, differs from the preceding one in this, *that it does not require a present possession* for the institution of proceedings, but, on the contrary, that such proceedings may be founded upon *any previous possession* not protected by the statute of limitations, is the correct one. We do not *see the disconnected style* of composition, attributed to the section on this theory, by the learned counsel. The draftsman of the section commences by providing punishments for two specific offences, and then *reverts* to the *first-named* punishment for the purpose of providing for certain details in the *proceedings* incident to the enforcement of such punishment. This is not a want of connection in thought, or an absence of method. It might have been better to finish the topic of forfeiture, as to both what could cause it, and what details would be proper in proceedings to

enforce it, and then to take up that of the *penalty;* but it is ordinary for courts to *transpose clauses, in writings requiring construction*, if such transposition will extricate from a confusion otherwise existing, and, if the court think proper, this will be done here. Transposition, however, is not necessary.

To show that the word "*found*," in the forfeiture clause, must be implied in the *penalty* clause, reliance is placed by the learned gentlemen (Brief, p. 31,) upon the 180th section of the same act, which, because not quoted by them, we will give:

"That if any person liable and required to pay any tax upon any article, goods, wares, merchandise, or manufactures, as herein provided, shall sell, or cause or allow the same to be sold before the tax to which such article, goods, wares, merchandise, or manufacture is legally liable is paid, with intent to avoid such tax, or in fraud of the revenue herein provided, any debt contracted in the sale of such article, goods, wares, merchandise, or manufactures, or any security given therefor, unless the same shall have been *bona fide* transferred to the hands of an innocent holder, shall be entirely void, and the collection thereof shall not be enforced in any court. And if any such article, goods, wares, merchandise, or manufacture has been paid for, in whole or in part, the sum so paid shall be deemed forfeited, and any person who will sue for the same in an action of debt shall recover of the seller the amount so paid, one half to his own use, and the other half to the use of the United States."

13 Stat., 305.

The forty-eighth section had, *according to our theory*, provided for a *forfeiture* of all *articles, &c., found* in the possession of any person having them, with intent to defraud, &c.; and further, had imposed a *penalty* upon any one who,

within a reasonable time anterior to the prosecution, had had in his possession such articles, with such intention. If the law had gone no further, the punishment of a party *found* with the articles would have been greater than that of him who had *sold* them; the former would lose articles and penalty, the latter would lose *penalty* only. The 180th section, which from its *number* may have been added by way of amendment in order to meet the above difficulty, provides that the party in the second instance shall also be liable to *forfeiture*, *i. e.*, of the proceeds of any sale made.

The theory of the Government is that, taking into view both of the above sections, *penalty* and *forfeiture* both are inflicted, as well where the party has given the strongest evidence of his intention to defraud the revenue whilst the articles were in his possession, viz: *a sale of them*, without paying the tax due, as where the intention is not so demonstratively revealed, *the article remaining in the proper custody*. The opposite theory is open to the objection that it leaves the party against whom the evidence of intention is not so strong, and who perhaps should have a *locus pœnitentiae*, to a *double infliction*, whilst he whose guilt is irrevocable receives but *one*; so that contrary to the generally received views upon the subject of such discipline, a party who entertains evil thoughts had better hurry up their execution.

We therefore think that the clause in the declaration stating that the articles had been *actually sold*, &c., (which is criticized on p. 31 of the Brief,) is proper, as an allegation of the intention with which possession had theretofore been had. That the plaintiffs in error once possessed, and then sold without paying, seems strong to the point that they had *possessed with an intent not to pay*.

We also submit, to follow the brief of the learned counsel in its *verbal criticisms* of the 48th section, (pp. 33, &c.,) that the views of the plaintiffs in error upon the force to be given to the words "such" "and shall have," are *refinements*. As for the former, it is not unusual in legislation to meet with a gloss inserted by the draughtsman, at the same breath as it were, intended to explain a relative qualifying several words used by him, as here, "such goods, wares, merchandise, articles or objects, [*i. e. meaning by "such,"*] subject to duty as aforesaid." Indeed there seems to be some inconsisteney in the brief upon this word, as is seen by comparing p. 35 with p. 39 under the topic "Seventhly." We may add that, if the word "such" had been used by the draughtsman of this section in the sense suggested by the plaintiffs in error, he would not in the second clause of the same sentence have used so long a periphrasis to explain the same idea, but would there have repeated the word *such*, before "*goods*," &c. The change of expression after the semicolon (marking the close of the part italicized in in the Brief,) suggest that the "*goods*," &c., mentioned afterwards, are not identical with those alluded to in the former part of the sentence—contrary to the supposition in the brief.

It seems also common to legislators to use the word *shall* for *shall have*. It is rarely that they provide punishment for a man who *shall have* committed crime, on the contrary they almost always say (*ex. gr.*) he who *shall* commit treason shall suffer death, &c. (See Bright. Dig. Stat., 2nd vol., CRIMES.)

It is also claimed (Brief, p. 37,) that the views of the plaintiffs in error derive support from a consideration in

this connection, of section 45 of the act of 1866, which is as follows:

"That any person who shall remove any distilled spirits from the place where the same are distilled, otherwise than into a bonded warehouse as provided by law, shall be liable to a fine of double the amount of the tax imposed thereon, or to imprisonment for not less than three months. All distilled spirits so removed, and all distilled spirits found elsewhere than in a bonded warehouse, not having been removed from such warehouse according to law, and the tax imposed by law on the same not having been paid, shall be forfeited to the United States, or may, immediately upon discovery, be seized, and, after assessment of the tax thereon, may be sold by the collector for the tax and expenses of seizure and sale. And proceedings upon such seizures shall be according to existing provisions of law in relation to distraint, and in conformity with any regulations which shall be made by the Commissioner of Internal Revenue. And the burden of proof shall be upon the claimant of said spirits to show that the requirements of law in regard to the same have been complied with. And any person who shall aid or abet in the removal of distilled spirits from any distillery otherwise than to a bonded warehouse as provided by law, or shall aid in the concealment of such spirits so removed, shall be liable on conviction thereof, to a fine of not less than two hundred nor more than one thousand dollars, or to imprisonment for not less than three nor more than twelve months. And any person who shall remove, or shall aid or abet in the removal of any distilled spirits from any bonded warehouse, other than is allowed by law, shall be liable to a fine of not more than one thousand dollars, or to imprisonments for not less than three nor more than twelve months."

14 Stat., 163.

It appears to us that this section also bears out our views.

The *forfeiture* clause of the 48th section (above) had included intent to *remove* as well as intent to *sell;* the *penalty* clause included only intent to *sell.* Taken altogether, the 48th section imposed double punishment upon him in whose possession with intent to *sell*, etc., the articles were found; single punishment (that is *penalty*) upon him who already had sold them; and single punishment also, (that is, *forfeiture*,) upon him in whose possession with intent to *remove*, etc., such articles were found. The 180th section of the same act remedied, as we have seen, the second case, by making the punishment there also *double.* The 45th section (above) remedies this third case in like way. So that all three are, upon the whole, treated as far alike as practicable; the case of actual *removal* without intent being, for police reasons, perhaps, connected with the machinery of the *Internal Revenue Law*, placed upon a like footing with other cases where *intent to defraud* exists.

Nor does the existence of the provisions quoted in the Brief (pp. 40–42) at all suggest that, in cases where they *have not been applied*, (owing, say, to the corruption or inadvertence of some revenue official) *other remedies* might not be placed in charge of a different class of public officers.

II. It is assigned for error that, the action being Debt upon a penal statute against *three* only *two* of whom are found indebted, judgment has been given against those against whom the verdict has gone, whereas, it should have been given against the United States.

The particular distinction, first taken in *Bastard* vs. *Hancock*, Carthew, p. 36, between Debt upon penal statutes, and other forms of Debt, was not under consideration by Blackstone or Comyn, or Mr. Justice Thompson, in the passages

quoted in the brief, (p. 46.) These are, therefore, no authorities against that distinction. There remains for the plaintiffs in error the great authority of the elder Parsons. The case in Carthew, however, was not cited before him, nor that in Buller's N. P., which is that referred to in the brief as being found in East. Even C. J. Parsons must yield a point of pleading to the extraordinary authority of Chitty and Sergeant Williams. (For the latter, see 2 Sanders Reports, 117 c, *Coryton* vs. *Lithebye*, note c.) The passage in Chitty has stood the test of twenty editions without change. The case in Carthew is the leading authority, and according to him, although it was tried before Holt at N. P., it was decided on the point of the proper *entry*, "after great debate" in the C. B. Lord Thurlow was very fond of undervaluing persons who stood in his way. Since his *tones* and *looks* have disappeared from among men, his reputation, even in his own sphere (of equity) has greatly subsided. His right to pass upon a *common law* reporter like Carthew may be questioned. Two much better lawyers, Welles and Kenyon, speak highly of Carthew as a reporter, and Lord Campbell, with respect.

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III. "The judgment denies the truth of the writ and declaration in an essential particular." (Brief, p. 49.)

This assignment of error appears to be very much like the one just argued. So far as it is *not*, we submit as a reply:

Where an action founded upon a tort is brought against a *firm*, imputing as its ground an intent to defraud, such imputation must be, of course, only *upon the members of the firm personally*. The fraud is not, *technically*, (that is, in the

sense necessary for the purposes of the Brief,) a *partnership transaction*, as no firm can be recognized by law as constituted for such *business*. Reference therefore in the pleadings to the fact that the wrong-doers are also connected as partners, is not matter of substance, and therefore the pleader is not bound to verify it against all the defendants, any more than in any other action founded upon tort. In law, such pleadings are read as a charge of joint and several liability.

In addition, it seems that the statute of *jeo fails*, (1 Stat., 91,) cures this special defect, supposing it to exist.

In arguing the question upon the rulings of the court as to the admissibility of certain evidence, (*Brief*, pp. 52, &c.,) we will premise by remarking that we shall treat the entries in the canal books as ordinary entries in books kept in the course of official duty. The canal had been leased to the private parties, and there is little to show, so far as the present point is concerned, that the business of such parties differed from that of any other persons contracting with the public.

As regards the railroad books, nothing is urged in the brief. We suppose them to be unobjectionable. It does not appear upon the record that the entries therein were not made with a full knowledge of their truth by the officials making them, some of whom were dead, and others living, and examined. It is also stated that they were made in the course of business. (Rec., p. 27.)

The canal books had been kept at three different offices, Piqua, Dayton and Cincinnati; the first, of *clearances northwardly* from the place where the distillery was located; the the second, of those *southwardly*; and the third, of *arrivals* at the southern termination of the canal. The course of

business made it the duty of three persons, Brown, Carson and Messerole, to keep such books at the above place, respectively. The books of the latter were a check upon those of the former for all freight coming down to Cincinnati from, or from above those points, (Rec., p. 25, *top*,) and it was the duty and practice of collectors at such points to *inspect the freight as the boat was* unloaded, (*ibid*, p. 22, above *middle*,) for the purpose of checking the books at the clearing offices, &c.

It is shown (Rec., p. 25, *middle*) that for all entries by Brown, in evidence, there are corresponding ones of Messerole. As the latter were kept in the course of business by one who was introduced as a witness, and knew of their truthfulness, any objection to the admission of the books of Brown, which were only a duplicate of these, must be regarded as immaterial. Our position seems to be even stronger than this, for Messerole proves that the entries, to whose truth he can testify, ought to have corresponded, as to the entries in question, with those by Brown, thus, by showing that *his* were accurate, he proved that Brown's also were accurate, although the person who kept them had not the *knowledge* (in the *strict* sense) that they were so. It will be borne in mind that these books were admitted for no more than to show that certain *quantities* passed a certain point at a certain date.

The question remains as to the books of the collector at Piqua, *Carson*. The clearances recorded by him were for freight moving northwardly, and so we are not aided by the books of Messerole. It was admitted by the Government upon the trial (Record, 26) that certain specified items on Carson's abstract were not to be charged. These include

849 barrels. There remain 292 barrels charged against the defendants upon the authority of Piqua books.

When Carson says (Rec., 23, near *bottom*) that he had no personal knowledge of the truth of the statements in the certificates, we do not understand him as saying more than that he did not know the truth of all the matters set forth as to any one statement. Referring to Exhibit B, (Record, p. 42,) we submit that he must have known that the *name of the boat was* properly given, and where the articles were to be unloaded at Piqua, that this statement was true. He says that he *believes* that all his entries were correct (*Ibid*, p. 23.) He evidently meant to say (as regards his personal knowledge) that in regard to any one item in such abstract he did not know that it was *true*, (a knowledge which would extend to every particular under each column in regard to such item,) and not that he did not know something about each. Now, as regards articles unloaded at Piqua (as already shown as regards those at Cincinnati) he had *extraordinary* (not merely *formal and bookkeeping*) duties to perform, which required him to verify his books. It may safely be presumed then that his denial of knowledge did not extend to so much of the items in regard to articles unloaded at Piqua, as expressed their *quantity*. These will include all the remaining items except a small one of *ten* barrels, being the last upon the abstract, *marked* as to be unloaded at "St. Mary's."

The bill of exceptions prepared by the plaintiffs in error shows (Rec., p. 28, near *top*) that "some, but not all, of said captains were examined, and testified to the carriage of whiskey from Chaffee's distillery on their boats, at dates corresponding, and in quantities corresponding to the several certificates by such captains signed. Captain Burk-

heard, who signed the "St. Mary's" certificate, may have been one of these. If he were not, the plaintiffs in error should have stated it in the bill of exceptions, as the laboring oar is upon them to show that no witness was introduced whose testimony rendered the exception in question immaterial. And in this connection it seems just to remark that if the particular question before the court, (as to the competency of these *canal entries*) shall be considered by them as involving less than the whole of the certificates signed by the captains, the passage in the record last given may render such question an unnecessary one. If the question be as to the competency of a writing as evidence, the court will require to know whether they have before them all the evidence heard below in regard to its competency before they overrule a decision in its favor. Error is not presumed.

But if the court shall not agree with all of these suggestions as to the construction of the record, we must, so far as necessary, rely upon the general principles which govern the introduction of entries *in the course of office*.

In some of the cases here the officer making the entry was not dead. In such cases he was introduced as a witness.

We submit that it is not material to inquire whether the books were kept under a regulation by the State; that it is sufficient to show that they were kept according to the course of office established by the lessees, (*Welsh* vs. *Barrett*, 15 Mass., 380;) also, that the course of office is as to the *entries in the books*, not as to the *way bills* (*Brief*, pp. 80, &c.,) or other matters not pertaining to the office.

So far as entries were made by persons whose duty it was,

and who are living, and shown not to have *known* the truth of those entries, we submit that the principle which underlies the competency of this class of evidence is a confidence in the general honesty and truthfulness of such entries, like that felt in the general uniformity of all natural phenomena; provided there be nothing to show that such testimony has been (to use a plain, but expressive phrase) *cooked*. All intelligent business persons feel great confidence in its revelations, irrespective of any inquiry into the intelligence of the officer who made the entries. It is enough to know that *these* are the freight books, say of such and such a steam navigation, or railroad, or canal company, to cause one to conciliate at once favor for their contents.

It seems to us that much evidence quite as reliable as that of most other classes will be excluded, if it be required of clerks of companies doing transportation business by ships, railways, or canals that they shall have a personal knowledge of the truth of every detail of freight entered by them in the course of duty,—or, otherwise, that their books kept in (what in may cases is) the only practicable way, shall not be competent evidence of such matters. A vast mass of facts intimately connected with commercial business, and therefore of great importance in litigation, is every day being recorded in such books, in cases where it is impracticable, not to say impossible, that the entry-maker should know their truth. It seems reasonable that a general confidence should be reposed in such books as accurate in all cases where, as here, there is nothing in the character of the entry or of the transaction to show interest in misrepresentation. It is probable that the proportion of truth to be found in the *books* throughout the country containing such entries for

the past generation is at least equal to that existing in records of *evidence* received and acted on by our courts during the same time under the guaranty of the technical rules which govern that subject. To exclude them in cases like the present seems to us to disregard the only practicable means of solving a great, important, and rapidly increasing class of questions arising in litigation:—

The principle in *Price* vs. *Torrington* was as great a shock to the more conservative thought of the profession at the beginning of the last century, as its development administered by the court below is claimed to be to such thought now. It may well be said that such development is as necessary to the condition of commerce now as the form in which it originated was to the *business* of 1704. Such seems to be the tendency of those views of this court in the Third of Wallace, which are referred to and attempted to be *distinguished* in the Brief, (pp. 69, etc.)

As to the exceptions to the Charge, we prefer to take them *seriatim*, as presented upon pages 15, &c., of the Brief, preserving the *numbers* there given.

8. The use of the word *wrong* was evidently a slip of the tongue, by which it is not probable that the jury were affected, as what the court was then speaking of was not the *truth* of the charge, but the *time* covered by it.

9. The court at this point was expressing its opinion as to the relative value of the two sorts of evidence, *oral* and *written*. We submit that such opinion is in accordance with the law. It asks the jury upon which of the two they can

better repose confidence, leaving the matter to them, although expressing the effect upon its own mind of the *hapless conflict* existing between the witnesses as to the amount of spirits on hand in October, 1865.

10. It seems certain that the *mistake* referred to is not a *necessary* one. The learned judge's statement that counsel had argued no more than that such evidence lacked *demonstrative certainty*, is not denied, and so we take it to be true. His instruction that less than that degree of certainty would leave the Government still entitled to a verdict, cannot be successfully assailed.

11, 12, 13. As the learned counsel admit in the brief, they have excepted to the *whole charge*, in detail. In considering any paper thus *piecemeal*, risk is run of doing injustice to its meaning by tearing connected passages asunder. In the charge, the thought commencing in exception 10 in the brief with "the utmost which counsel has said of it is that it lacks that demonstrative certainty," &c., runs through exception 11, and closes only with the conclusion of exception 12, where it announces a proposition of law which is familiar, viz., where one has in his power proof which if produced would render a material allegation certain, the law *presumes* against him if he omit to do so, so far as to *authorize* a jury to resolve all *doubts against him*. The words attributed to the learned judge in the preliminary discussion may not have been just what he would have selected in his office, with opportunity for deliberation,—as the passage employs *doubt, and reasonable doubt*, as well as other words not exactly synonymous, somewhat interchangeably. But the general drift is intelligible, and as reflected in the concluding propo-

sition, (the practical import of which is that the jury was authorized to resolve all doubts against a party who continued silent when he ought to speak,) is entirely correct. The abstract rule as to conducting defences here laid down, would seem not only to be applicable to the present case, but universally in important cases, and in all such the defendants should bring in the best evidence under their control; and are moved thereto by considerations upon a par with the importance of the issue.

14. It seems that the rule announced here by the court is according to authority and principle, and as the court had already announced (Rec., p. 30, *near middle*,) that it would *at any stage of the case* allow evidence to be introduced by way of explanation or to supply an omission, it seems that Mr. Follett's suggestions upon interrupting the court were not well founded. See what is said by Alderson, B., in Boyle *vs.* Wiseman, 10 Exch., p. 650.

Since all parties to civil actions have become competent, as witnesses therein, we are at a loss to understand how the courts can prevent, or how justice is interested to prevent, juries from observing matters like the incident here mentioned. They observe them because they are part of the *silent testimony* in the case, which frequently is stronger than whole volumes of ordinary testimony, and is of the very highest value to the cause of truth. If they be part of the testimony, they may of course be noticed by the court.

The policy which protects witnesses from answers tending to criminate them, or which indemnifies them from the consequences of confessing crime where they are not testifying

in the course of a proceeding against themselves, touching the very crime confessed or not denied, does not extend to such criminal proceedings; (the principle of course is the same as to *forfeitures*.) It is no healthful state of society where delinquencies are *always* being hunted for. There are times and places for all things. Because a man is upon the witness stand, is no reason why he should be called upon to subject himself to prosecution. Nor, on the other hand, when a prosecution is already on foot, and before a jury for trial, is there any reason in the interest of justice why the party charged, being otherwise competent, may not be asked as to his liability, and left by the law to the consequences of confession or silence; or why, if he choose to remain unknown, he shall not be subjected to the rules affecting him who produces an inferior class of evidence when known to possess a superior.

The defendants had *books* which they would not produce upon a *notice* in behalf of the Government, much more, would not introduce as evidence in their own behalf:—

There were *two* defendants, acquainted with the business; neither would appeal to the other to testify in his behalf. The most that is claimed as a defence for their refusing to testify for themselves, is that they could not be called upon to criminate themselves; but in that case, either without affecting himself, might have vindicated the other, if innocent.

15. Evidence was given by a witness for the defendants that they had kept *day-books*, ledgers, &c. Of course by *books* is meant *accounts* of the various sorts specified. In the presence of uncontradicted testimony that there were such

accounts, there seems to be no fair objection to an instruction that the law presumed it to be so.

16. This, also, seems to contain no error.

17. *Due search* for such books would require an appeal to the surviving partners, and similarly a *subpœna* to produce such books should be addressed to them. This seems to be upon a presumption of the law that their place of deposit is with such survivors.

18. No more need be said upon this than has, in other connections, already been said.

19, 20, and 21. By reference to the context, *i. e.*, the *rule*, as given at the close of *number* 12, we suppose the learned judge to mean in these passages that from the failure of the defendants to produce certain evidence which was in their power, and which they could naturally have introduced, if it had not been adverse, the jury were authorized to resolve all doubts against them, and that if upon so doing they were left without reasonable doubt of the case by the United States, they should find a verdict for the latter. We need say no more in support of this position.

At the close of his charge, his honor made a formal disclaimer of any disposition to influence the jury upon any matter of fact by an expression of his own opinion thereupon.

Tracy vs. *Swartwout*, 10 Pet., 80.

GEO. H. WILLIAMS,
Attorney General.

S. F. PHILLIPS,
Solicitor General.